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Criminal Justice, Local Democracy, and Constitutional Rights

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CRIMINAL JUSTICE, LOCAL DEMOCRACY, AND CONSTITUTIONAL RIGHTS

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THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE. By *William J. Stuntz*. Cambridge and London: Harvard University Press. 2011. Pp. viii, 312. $35.

INTRODUCTION

Universally admired, and viewed with great affection, even love, by all who knew him, Harvard law professor Bill Stuntz[1] died in March 2011 at the age of fifty-two, after a long, courageous battle with debilitating back pain and then insurmountable cancer. In a career that deserved to be much longer, Stuntz produced dozens of major articles on criminal law and procedure. He was a leader in carrying forward the work of scholars who had analyzed criminal justice through the lens of economic analysis,[2] and he added his own distinctive dimension by insisting on the importance of political incentives, with their often-perverse effects.[3] Ever the contrarian, Stuntz excelled at challenging conventional wisdom, usually from a counterintuitive direction. He often succeeded in shaking an accepted consensus; even readers who remained skeptical were forced to reexamine their fundamental assumptions about how the criminal justice system works.

The Collapse of American Criminal Justice ("*The Collapse*") sums up much of Stuntz's most important work. It brilliantly describes the deplorable injustices of contemporary criminal justice—most notably our massive levels of incarceration and shockingly disproportionate rates of imprisonment for minorities. And, in keeping with the style for which Stuntz became famous, it proposes startlingly original solutions.

Stuntz argues that much of the responsibility for our predicament lies, astonishingly, with the very reforms that were intended to promote greater fairness and equality in criminal justice—police professionalism, substantive criminal law revision, and the Warren Court revolution in criminal procedure. In Stuntz's account, the professionalization of policing prevented local urban districts from using less punitive, community-based methods of

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1. William J. Stuntz was the Henry J. Friendly Professor of Law, Harvard Law School.

2. For an example of earlier work in that vein, see, e.g., Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983).

3. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

social control. The Warren Court's due process revolution gave defense attorneys less reason to focus on questions of genuine innocence and gave prosecutors stronger incentives to leverage guilty pleas. Legislatures compensated for new difficulties in prosecution by starving the indigent defense system, enacting broad, easily proved offenses, and ramping up the severity of punishment. The upshot was less attention to factual guilt; greater prosecutorial control over who gets punished (and how much); and even greater disparity between rich and poor, between whites and blacks. All this is laid at the door of police professionalism, criminal justice expertise, and civil liberties landmarks like *Mapp*[4] and *Miranda*.[5] It is a blistering indictment.

Stuntz's account presents a challenge that no one concerned about constitutional rights or social justice can ignore. *The Collapse* is not merely a warning to proceed cautiously. It is an urgent plea to make an immediate U-turn—to de-emphasize expertise and judicial safeguards and to return instead to democratic control through small political units. Beyond its criminal justice implications, this argument has broad significance because it resonates strongly with important preferences in contemporary policy analysis and academic theory—specifically, the public choice approach to assessing legal change and the school of constitutional thought holding that long-term reform comes only through democratic politics rather than courts.

For these reasons, the argument warrants an especially thorough assessment. The poor and the vulnerable desperately need protection from state power and the ignoble instincts that can emerge from majoritarian politics. If Stuntz's claims are flawed, yet those who seek to protect the disadvantaged lose faith in expertise and the courts because of the doubts that he raises, the already-fragile safeguards of our criminal justice system and the social support that those safeguards depend on will be left even weaker than they already are.

Fortunately, a considerable body of material is available to respond to the book's challenge. This Review takes up that assignment. Part I summarizes Stuntz's argument. Part II turns to the book's historical claim—that before the 1960s, the justice system outside the South worked reasonably well. The evidence, taken as a whole, shows a very different picture. To be sure, crime rates and imprisonment rates were low by today's standards, but in other respects the pre-1960 systems had grave shortcomings.

Part III turns to the book's two causal arguments—that the positive features that prevailed before 1960 (low rates of crime and imprisonment) were due in part to informality and local political control; and that these advantages evaporated partly *because of* professionalization, expanded procedural safeguards, and the erosion of local democracy. These claims too are at odds with the great weight of the evidence. The worst defects in criminal justice before 1960 flowed directly from the localized politics and weak procedural protections that Stuntz seeks to restore. There is no basis for giving those mechanisms any credit for that era's low rates of crime and

4. Mapp v. Ohio, 367 U.S. 643 (1961).

5. Miranda v. Arizona, 384 U.S. 436 (1966).

imprisonment. Rather, those advantages flowed from social conditions that changed with astonishing speed in the 1960s and that are unlikely ever to return. Properly understood, the history suggests that restoring political power to local neighborhoods cannot help cure—and likely would aggravate—the ills of contemporary criminal justice.

Part IV considers the book's proposals for concrete reforms. Because its principal theme—the value of localized democracy—appears in other currents of contemporary scholarship,[6] steps to return some decisionmaking authority to the local level could have merit whether or not the book's history withstands scrutiny. But surprisingly (given the analysis that dominates the first three-quarters of the book), *The Collapse* suggests few steps to reempower neighborhoods. Instead, while Stuntz continues to insist that decisions like *Mapp* and *Miranda* were unwise and would best be overturned, his own proposals for reform envisage a dramatically *expanded* judicial role in protecting minorities and the poor. Indirectly, but tellingly, the book's remedial proposals reinforce the conclusion that emerges from assessing its historical analysis: local political control of the sort America had before 1960 is no longer a viable option. Rather, constitutional limits on law enforcement, vigilantly enforced by courts, remain indispensable elements in the institutional design of a democratic society.

I. THE THESIS OF *THE COLLAPSE*

A vivid comparison frames Stuntz's thesis. On one side of the ledger, contemporary criminal justice is a mess: prisons are bursting, sanctions are shockingly unequal, outcomes are almost entirely determined by prosecutors' unchecked discretion, and crime rates remain stubbornly high (pp. 1–2). Yet, Stuntz argues, "It was not always so" (p. 2). For roughly sixty years, from the 1890s through the 1950s, American states outside the South "punished sparingly, mostly avoided the worst forms of discrimination, [and] controlled crime effectively . . . . [C]riminal justice worked" (p. 2).

What accounts for this shift? What happened in the 1960s to make that period a turning point? The signal legal events of that era, of course, were the civil rights and due process "revolutions." But few would expect that those developments, designed to enhance the decency of American institutions, made our society more punitive and more discriminatory. Stuntz, however, argues that those reforms had calamitous consequences—not just for "law and order" but for equality and fairness (Chapter Eight). Although he briefly acknowledges that other forces contributed to contemporary ills, Stuntz focuses primarily on the unexpected political and legal dynamics that, he argues, were unleashed by efforts to improve criminal procedure and substantive criminal law.

At the core of *The Collapse* is Stuntz's argument that the "experts" who perpetrated these reforms—police professionals and the Warren Court for

6. *See* DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 86–93 (2008) (summarizing these arguments).

criminal procedure; academics and the American Law Institute for substantive law—bear much of the responsibility for the collapse of practices that were largely successful for more than half a century: "[P]rofessionals and experts changed the justice system almost entirely for the worse" (p. 194).

Why did reforms grounded in expertise and good intentions backfire so catastrophically? Although Stuntz brings diverse perspectives and a wealth of data to his argument, his principal analytic device is that of political economy: he works from the incentives of self-interested legal and political actors to demonstrate how we can expect each new development to percolate through multilayered institutions.

Consider police professionalism—formal training, civil service protection for officers, and a hierarchical chain of command—as a replacement for neighborhood control of precinct captains and cops on the beat. The costs of crime and the effects of punishment on wrongdoers and their families are concentrated, Stuntz writes, in the local communities where victims and perpetrators typically live in close proximity.[7] When prosecutors, police chiefs, and subordinate officers were political actors closely attuned to neighborhood priorities, the affected communities had to balance desires for vengeance and safety against needs for fairness to offenders and suspects. Now that professionalization has taken hold, however, criminal justice policy is mostly set by bureaucrats responsible to more distant constituencies, largely affluent and white, whose members can act on their desires for harsh punishment without bearing its costs (pp. 31–39).

Similarly, consider through the lens of political economy the effect of new procedural rights. Attorneys have only so many hours and resources available to defend their clients; meanwhile, the new Warren Court due process rights, Stuntz claims, are mostly unrelated to the question of guilt versus innocence (pp. 227–30). Because defense attorneys have a duty to raise procedural defenses when possible, every minute spent invoking a new procedural right will, he claims, inevitably "siphon[] the time of attorneys and judges away from the question of the defendant's guilt" (p. 228). Indeed, Stuntz argues, the Bill of Rights itself was wrongheaded from the beginning in emphasizing procedural guarantees (pp. 79–80). And when a court focuses, as the Warren Court did, on procedural safeguards rather than substantive protection—such as a ban on unduly severe sentences—a legislature can easily enable prosecutors to avoid the new barriers: it need only criminalize trivial conduct that is easy to prove (such as speeding, or possession of small drug quantities), ramp up the available punishments, and withhold adequate funding for indigent defense. And this, Stuntz argues, is precisely what happened after the 1960s in response to procedural barriers that the Warren Court had erected (pp. 260–65).

The chain of bad consequences does not stop there, Stuntz suggests, for two further reasons: new procedural obstacles incentivize prosecutors to induce guilty pleas, and the tools newly made available to circumvent those obstacles—multiple charges and more severe sentences—make it easier than

7. *See* pp. 6–7.

ever for prosecutors to do so. As a result, he argues, these new constitutional safeguards drive down the rate of adjudications at trial (pp. 235–36). Prosecutors induce many more defendants to plead guilty in plea procedures that afford them almost no safeguards at all (pp. 257–63). And again, in Stuntz's account, this is precisely what happened: the guilty plea rate rose sharply (pp. 139, 264). Adding insult to injury, innocent defendants (those most likely to benefit from trial) are, Stuntz says, harmed by this dynamic more than guilty defendants are. (pp. 264, 302). The net effect, paradoxically, is fewer safeguards, less transparency, more severe punishment, and greater unfairness.

If these claims are sound, the reform efforts of the 1960s were disastrously misguided. An urgent imperative follows: we must relax the procedural safeguards of the Warren era and return to localized democratic control of criminal justice. The remaining Parts of this Review assess the distinct steps in that argument.

II. AMERICA BEFORE 1960—DID CRIMINAL JUSTICE WORK?

The Collapse makes striking descriptive claims. Stuntz asserts that prior to 1960, crime, punishment, and—outside the South—discrimination were quite low or moderate by today's standards. All these measures, he argues, began to rise in the 1960s. Then, beginning in 1970, they rose precipitously for about two decades. Simultaneously, "jury trials, once common, became rare events," and "a locally run justice system grew less localized, more centralized" (p. 7). These parallel trends—diminishing local control over criminal justice alongside diminishing fairness and public safety—set the stage for Stuntz's central thesis: the former, he says, contributed significantly to the latter.[8] To provide a context for considering that causal claim, this Part examines the state of criminal justice pre-1960.

Whether criminal justice prior to 1960 really did "work" and whether "[i]t doesn't anymore" (p. 2) are inevitably matters of degree. Short of complete anarchy, the institutions of any society necessarily "work." To appraise conditions overall, we need to examine the strengths and shortcomings of earlier eras in depth and along multiple dimensions. In *The Collapse*, Stuntz acknowledges that pre-reform institutions were imperfect, but he mentions defects—corruption, brutality, and discrimination—only in broad strokes, always emphasizing that successes in controlling crime with modest levels of punishment far outweighed these shortcomings.[9] Yet numerous authorities insist that criminal justice before the 1960s was in disarray.[10] Of course,

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8. "[C]orrelation does not prove causation. But this coincidence seems more than coincidental." P. 7.

9. For representative passages, passing lightly over the flaws during the 1880–1930 period, see pp. 31, 142.

10. *See, e.g.*, THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY vi (1967) [hereinafter 1967 CRIME COMM'N] (finding "overwhelming evidence" of institutional shortcomings throughout the United States); U.S. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, WICKERSHAM

the book's point is to challenge conventional wisdom, so it will not do simply to cite sources with different views. We have to weigh the evidence.

Fortunately, the evidence is largely consistent and can be summarized with little oversimplification. The picture it presents is not one of effective, locally based institutions nicely accommodating diverse community needs. Rather, it shows in convincing depth and detail that informal administration, localized politics, and freedom from professional norms produced dysfunctional systems. Stuntz's treatment—and the broader contemporary nostalgia for the era of majoritarian politics with few judicial checks—suggests a need to recover the lessons of that time. It is therefore worth recalling in detail what informality and localized political control meant in practice.

A. *The Early 1920s and Before*

In the 1870s and 1880s, civic commissions in several major cities initiated investigations of their police. The 1890s saw a proliferation of such commissions, all of which "demonstrated . . . convincingly that corruption and incompetence were endemic to the big-city police."[11] These reports were of uneven quality, but a 1922 report that rigorously surveyed criminal justice in Cleveland—then America's fifth largest city—presents an exceptionally careful and complete picture of American criminal justice early in the twentieth century.[12] Despite its local focus, the Cleveland Report makes clear that "[t]he deep-seated causes for [conditions in Cleveland] will be found in other cities throughout the country."[13] It captures, in impressive detail, conditions at the beginning of the 1920s, before Prohibition complicated the picture.[14]

The Cleveland Bar Association and other civic groups commissioned the Cleveland Report in 1920.[15] Far from thinking that their justice system worked, members of these civic groups believed that their city faced a crisis. Felix Frankfurter, in a preface to the 750-page report, explained, "For some time previous [to 1920] Cleveland had been restive under a growing feeling of insecurity of life and property. [The city] entertained a wide-spread conviction of its failure in the most primitive function of government."[16] To address those concerns, the civic groups initiated a comprehensive empirical study under the direction of Frankfurter and Roscoe Pound. The effort,

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COMM'N REPORTS NO. 11, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931) [hereinafter WICKERSHAM COMM'N, REPORT ON LAWLESSNESS]; Samuel Walker, *Origins of the Contemporary Criminal Justice Paradigm: The American Bar Foundation Survey, 1953–1969*, 9 JUST. Q. 47, 56–58 (1992) (noting pervasive lawlessness and racism in the 1950s).

11. ROBERT M. FOGELSON, BIG-CITY POLICE 10–11 (1977).

12. THE CLEVELAND FOUND., CRIMINAL JUSTICE IN CLEVELAND (Roscoe Pound & Felix Frankfurter eds., 1922) [hereinafter CLEVELAND REPORT].

13. Felix Frankfurter, *Preface* to CLEVELAND REPORT, *supra* note 12, at v–vi.

14. Under the Volstead Act, Prohibition took effect in two stages—in October 1919 and February 1920. *See* ch. 85, 41 Stat. 305 (1919), *repealed by* U.S. CONST. amend. XXI.

15. Frankfurter, *supra* note 13, at v.

16. *Id.*

Frankfurter noted, produced few surprises. The study's value lay in its convincing documentation: "[The situation was] already suspected .... The point is that the survey *proved* it."[17]

The crime problem in Cleveland was more alarming than many had thought. With a population of eight hundred thousand in 1920, Cleveland had six times as many murders and seventeen times as many robberies as London, a city ten times its size.[18] In fact, there were "more robberies and assaults to rob in Cleveland every year than in all of England, Scotland, and Wales put together."[19] Cleveland's predicament, moreover, was not unusual for America. Compared to Cleveland, St. Louis had roughly twice as many robberies and burglaries.[20] And Chicago, although three times bigger than Cleveland, had five times as many murders.[21] Whatever we may think of these 1920 levels of crime, contemporaries did not consider their criminal justice systems successful.

In separate chapters devoted to police, prosecution, and the courts, the Cleveland Report details the reasons for this predicament. The problems, common to all three areas, centered on informality, political influence, haphazard procedures, and the failure to adopt management practices suited to agencies whose size, like that of the city itself, had exploded. Lack of professionalism affected operations in all areas. The police force consisted of nearly 1,400 officers, but these personnel did not bring expertise to the job; most were recruited from occupations like carpentry and plumbing, which provided no preparation for police work.[22] Turnover of commanders and patrol officers was rapid, supervision was "ragged," and lines of authority were "so vaguely drawn that effective administration would be impossible even under the best of conditions."[23] For prosecution, "traditions and methods [were still those] shaped at the time of the Civil War."[24] Case management was "casual," and positions for assistant prosecutors were "treated as so many political jobs to be handed out"; candidates, chosen "on the basis of politics or of allotment among the different racial groups," then became "largely independent functionaries."[25]

The courts mirrored these features. The number of judges had mushroomed, but with no central system for assignments, cases were shifted for no apparent reason.[26] Although judges no longer had personal knowledge of

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17. *Id.*

18. Raymond B. Fosdick, *Police Administration*, *in* CLEVELAND REPORT, *supra* note 12, at 3.

19. *Id.*

20. *Id.*

21. *Id.* at 3–4.

22. *Id.* at 6, 25–26.

23. *Id.* at 7–8.

24. Roscoe Pound, *Criminal Justice and the American City*, *in* CLEVELAND REPORT, *supra* note 12, at 559, 620.

25. *Id.* at 621, 623, 625.

26. *Id.* at 629.

the people appearing before them, written records and the ability to retrieve them were primitive, leaving judges in the dark when passing on bail, dismissals, and sentencing.[27]

The Report's authors saw little virtue in informality and grassroots political influence, the very features that Stuntz presents as sources of success. For the authors, "transient administration is fatal to success in any complex technical enterprise."[28] Of course, Pound, Frankfurter, and their collaborators were professionals and experts; their preference for professionalism and expertise is not surprising. But before dismissing their assessment as ideologically biased, we must consider the evidence that shaped it. Their reports document in detail why they viewed policing, prosecution, and the courts as "complex technical enterprise[s]" requiring systematic management.

First, take policing. Its old basis in personal relationships and local rapport had disappeared forever. "From a town in which many people knew each other intimately . . . Cleveland has become . . . a city of strangers."[29] Heterogeneity, anonymity, and instability even characterized individual precincts:

> It is not unusual for a migration of population to occur which completely alters the police problem of a district. The influx of negroes, which has occurred in the Eighth Precinct, presents a new police problem, and so does the mixture of races in the Third, Fifth, and Sixth Precincts. . . . [T]here have been instances of rapid change from good residential districts, with a permanent population, to boarding-house and furnished-room districts, accommodating a transient population.[30]

In short, the beguiling vision of cohesive communities had passed out of reach. Informality and local control were "one of the legacies of pioneer America [but they] result[ed] in almost complete want of continuity in administration . . . [and] waste of time and effort . . . . The pioneer notion of short tenure and selection from among the voters of a politico-geographical area is out of place in the city of today."[31]

Those structures of informality and grassroots influence go a long way toward explaining the malleable charging practices, low conviction rates, and mild sentences that Stuntz admires, but the Cleveland Report spells out what those outcomes represented for the people who experienced them at the time. Casual case management caused delay, "serial unpreparedness," and "laxity" at every stage.[32] Bail hearings, dismissals, and trial preparation were handled as "a perfunctory routine," even to the point of prosecutors'

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27. *See id.* at 629–32; *see also* Reginald Heber Smith & Herbert B. Ehrmann, *The Criminal Courts*, *in* CLEVELAND REPORT, *supra* note 12, at 229, 322–23, 326.

28. Fosdick, *supra* note 18, at 7.

29. *Id.* at 6–7.

30. *Id.* at 55.

31. Pound, *supra* note 24, at 615.

32. Alfred Bettman & Howard F. Burns, *Prosecution*, *in* CLEVELAND REPORT, *supra* note 12, at 85, 172.

"perfunctory acquiescence in suspension or mitigation of sentence."[33] And there seems to be no evidence that prosecutors reserved this lenity only for defendants from their own ethnic communities. Cases were "throw[n] . . . at [assistants] as chance dictates," and laxity was universal. Among other effects, these conditions created ever-present "opportunities for favoritism or corruption or abuse or extortion," with resulting "suspicion of the whole administration of justice."[34]

The courts failed to counteract these distortions and often compounded them. Although judicial elections had once yielded judges of good reputation with a degree of political accountability, the average citizen no longer had any reliable means to assess the qualifications of judicial candidates;[35] the "attempt[] to adapt the democracy of the town meeting to a great cosmopolitan population" had mostly produced only incompetence and corruption.[36]

Even the best judge, moreover, could seldom correct malfunctions. Judicial approval was nominally required for prosecutors' motions to *nolle* (dismiss) a case, but a high volume of cases and judges' inability to access information meant that such oversight, which had "flourished successfully under . . . rural conditions,"[37] had "decay[ed] into an empty form."[38] Prosecutors sometimes "clean[ed] house" by using a "blanket *nolle*" to dismiss as many as four hundred cases in a single motion.[39] For cases that remained, defense lawyers easily steered clients to compliant judges and used their knowledge of weak points to work the system for dismissals; "the most successful players of this game" were primarily "criminals by profession."[40]

For cases that were not dismissed, jury trials were uncommon. In 1920, out of 2,608 misdemeanor cases, less than 1 percent (only fifteen cases) were tried to a jury; among felony cases, guilty pleas accounted for 77 percent of convictions.[41] Because there was no stenographic record of preliminary hearings, moreover, perjury in subsequent proceedings was "rife."[42] And because judges normally could not retrieve court records, "the habitual offender," even if convicted, could easily manipulate the system to escape punishment.[43] These were the specifics that led Frankfurter to see not a well-working system but instead a "breakdown."[44] Growth and

33. Pound, *supra* note 24, at 621, 623–25.
34. *Id.* at 625–26; Bettman & Burns, *supra* note 32, at 207–08.
35. Pound, *supra* note 24, at 629.
36. Smith & Ehrmann, *supra* note 27, at 260.
37. *Id.* at 328.
38. Pound, *supra* note 24, at 630.
39. Smith & Ehrmann, *supra* note 27, at 328.
40. Bettman & Burns, *supra* note 32, at 238, 244.
41. *Id.* at 231 n.3, 236–37.
42. Pound, *supra* note 24, at 621; *see also* Bettman & Burns, *supra* note 32, at 116.
43. Bettman & Burns, *supra* note 32, at 238, 244.
44. Frankfurter, *supra* note 13, at vi.

industrialization had "turn[ed] into a menace the early American machinery and methods of law enforcement."[45]

B. *The Late 1920s*

Surveying the entire country a few years later, President Herbert Hoover's Crime Commission found conditions like Cleveland's everywhere.[46] The Commission—known by the name of its chair, Hoover's attorney general George W. Wickersham—conducted research in the late 1920s and issued its reports in 1931–1932.[47] It is best known today for its finding that police brutality in interrogation—the "third degree"—was systematic.[48] But its broader surveys of criminal justice institutions are more relevant here, and they provide even greater depth and detail than the Cleveland Report.

Nationwide, the commissioners believed, criminal justice was not working: perceptions of rampant crime had "caused a loss of public confidence in the police" and left "the citizen [feeling] helpless in the hands of the criminal class."[49] Although Prohibition was a major source of difficulty for law enforcement, the Commission found that the principal problems were not specific to Prohibition; they were structural and institutional.

With respect to the police, the Commission pinpointed as the principal evil the "insecure, short term of service of the chief."[50] In larger cities, the average tenure for a police chief was less than two and a half years, and his departure invariably produced "a more or less general shake-up of the subordinates from captains [down to] patrolmen .... [C]orporate business of any magnitude conducted on such short terms of service by its executive[s] ... would soon find itself bankrupt."[51] Moreover, the chief was often "wholly incompetent" and, as the mayor's personal appointee, he was frequently obliged "to go easy on this or that criminal ... who are in alliance with [the mayor's] patrons."[52]

The problems for police administration at the top—incompetence and political influence—were repeated all down the line[53]: "The second outstanding evil ... is the lack of competent, efficient, and honest patrolmen .... Even where there are civil service examinations, the hand of the politi-

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45. *Id.*

46. Nearly all the cities surveyed were outside the South. *See generally* WICKERSHAM COMM'N, REPORT ON LAWLESSNESS, *supra* note 10; U.S. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, WICKERSHAM COMM'N REPORTS NO. 4, REPORT ON PROSECUTION (1931) [hereinafter WICKERSHAM COMM'N, REPORT ON PROSECUTION]; U.S. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, WICKERSHAM COMM'N REPORTS NO. 14, REPORT ON POLICE (1931) [hereinafter WICKERSHAM COMM'N, REPORT ON POLICE].

47. *See, e.g.*, reports cited *supra* note 46.

48. *See* WICKERSHAM COMM'N, REPORT ON LAWLESSNESS, *supra* note 10, at 173–80.

49. WICKERSHAM COMM'N, REPORT ON POLICE, *supra* note 46, at 1.

50. *Id.*

51. *Id.* at 1–2.

52. *Id.* at 2–3.

53. *Id.* at 3–4.

cian is all too plainly visible in [appointments and] promotions."[54] Qualifications were minimal, and training, with few exceptions, was negligible.[55] While that approach had been tolerable in "rural or small-town policing," modern urban conditions multiplied the duties cast upon each officer and compounded the "opportunit[ies] for graft."[56] Police needed to develop "a scientific procedure, in which men are given professional education, are trained to use the latest resources of modern science and to employ trained intelligence as a substitute for . . . mere force."[57]

Despite the ethos of informality and political influence that dominated most departments, however, this was not a period when ethnic communities were policed by "their own." The Commission found that people often mistrusted cops on the beat because the officers were unfamiliar with the language and customs of recent immigrant communities. As a result, residents were "unwilling[] to expose a criminal of their race."[58] In addition to the need for better education and training for police, cities needed "more police officers . . . on each force who are of such races and familiar with their language . . . and cultural background."[59]

The Commission's assessment of prosecution and the courts likewise mirrored the Cleveland Report and added considerable detail. In practically every city surveyed, the court system handled guilty pleas, dismissals, and trials in a "haphazard, inadequate, and careless" manner.[60] Docket management was "poor."[61] Repeated continuances wore down witnesses and forced cases to be dropped but did not guarantee thoughtful treatment of cases that survived.[62] Instead, trial proceedings were chaotic.[63] In large cities, guilty pleas predominated—ranging from a low of 61 percent of all convictions in Milwaukee to over 80 percent in Chicago, St. Louis, and New York[64]—and the background facts available at sentencing were minimal.[65]

Overall, in virtually every city surveyed, the lack of systematic administration produced breakdown and dysfunction. Yet the Commission, unlike Stuntz, did not attribute high rates of dismissal and lenient sentences to

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54. *Id.* at 3.

55. *Id.* at 3–4.

56. *Id.* at 7–8.

57. *Id.* at 9.

58. *Id.* at 6.

59. *Id.* at 7.

60. Alfred Bettman, *Criminal Justice Survey Analysis*, *in* WICKERSHAM COMM'N, REPORT ON PROSECUTION, *supra* note 46, at 39, 93, 95–96, 98–102. Of the cities surveyed, only Philadelphia was judged an exception to this pattern. *Id.* at 103. The Commission explicitly endorsed the Bettman analysis. *See* WICKERSHAM COMM'N, REPORT ON PROSECUTION, *supra* note 46, at 4–5.

61. Bettman, *supra* note 60, at 106–07, 114–15.

62. *See id.* at 118.

63. *See id.* at 115–16.

64. *See id.* at 206.

65. *Id.* at 135–37.

measured, empathic decisionmaking; rather, it concluded—with detailed support—that case outcomes were the result of inattention, unpreparedness, inadequate information, and "a rapidity and casualness that precluded all possibility of careful knowledge or analysis of the facts or of intelligent disposition."[66]

Divided political responsibilities and localized control compounded all these problems. One leading beneficiary of this Balkanization was "organized crime [which] takes advantage of the complexity of the governmental organization of metropolitan [areas]."[67] The Commission saw existing political units as "illogical geographical divisions" hampered in "dealing with problems whose geographical units do not correspond to those of society's organs for solving them."[68] All told, "the inefficiency of the apparatus" left society with "a curiously ineffective way of protecting itself."[69]

C. *The 1950s and Early 1960s*

By 1950, reformers had succeeded in insulating many police departments from the influence of local ward leaders, and use of the "third degree" had waned.[70] But training of patrolmen remained minimal, and most departments were still run informally without systematic lines of command.[71] Most departments, even in big cities, retained the deficits that the Wickersham Commission had identified in 1931.

Writing in 1954, William H. Parker, chief of police in Los Angeles, described a justice system prone to "spectacular police failures."[72] Although many large police departments had better training and administration, and although almost all had benefited from technological advances (motorized patrol and radio dispatch), Parker reported that "*the police service today fulfills its task with no greater success than it did a quarter- or half-century ago*."[73] Ironically, Parker observed, even where police were still organized informally with relatively little supervision, that approach did not translate into strong relationships with communities because "[i]nstead of analyzing the causes for lack of [community] support and working toward their eventual removal, police have all too often withdrawn into a shell."[74]

Professionalization, Parker explained, was imperative:

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66. *Id.* at 115.

67. *Id.* at 157.

68. *Id.* at 155.

69. *Id.* at 155–56.

70. *See* SKLANSKY, *supra* note 6, at 34–36.

71. *See id.* at 36 (describing the "second wave" of police reform in the 1950s and 1960s as primarily focused on "streamlining operations, strengthening lines of command, [and] raising the quality of personnel").

72. William H. Parker, *The Police Challenge in Our Great Cities*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1954, at 5, 6.

73. *Id.* at 13.

74. *Id.* at 5.

> [T]he typical great city of the United States [involves] so many people of varied beliefs and modes of conduct . . . liv[ing] so interdependently that food, shelter, and even their very movement on the streets require delicately balanced co-operation . . . .
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> . . . .
>
> . . . Police inefficiencies which may go nearly unnoticed in the relatively stable pattern of rural life . . . [have] grave import [in] the fast-paced social and economic turmoil of the larger cities . . . .
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> . . . .
>
> . . . [Moreover,] [n]o single officer can effectively perform in the diverse and highly technical fields which police science has created . . . [As in medicine,] [t]he fact that Prairie Junction will not support a group of medical specialists does not make this situation an ideal to be followed in Chicago . . . .
>
> . . . .
>
> . . . [Organized crime is] too cleverly conducted to respond to suppression by any unplanned combination of patrol and investigation.[75]

During this period, reformers launched two major efforts to assess impressions like these more systematically—one by the American Bar Foundation and a second by another presidential commission. The Bar Foundation organized extensive field research during 1955–1957, with teams directly observing criminal justice agencies in operation. The researchers observed "a great deal of lawlessness, racism, and casual unprofessional conduct."[76] And these observers did not view the brutality and discrimination they saw as merely the episodic lapses of a generally sound system. In Detroit, for example, one researcher "observed the police routinely breaking into buildings to obtain evidence or make arrests, harassing homosexuals, and arresting prostitutes in massive 'sweep' arrests."[77] "Officials not only flouted the law; often they were completely ignorant of it. . . . The willful mistreatment of black citizens was pervasive."[78] In the early 1960s, reports continued to stress the existence of pervasive police lawlessness and abuse. Between 1960 and 1963, eight major cities "experienced police scandals of corruption and burglary, all of which received nationwide publicity."[79]

The circumstances were judged so dire that there was once again a national demand for systematic study and assessment. In July 1965, President Lyndon B. Johnson established yet another presidential commission charged

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75. *Id.* at 5–6, 10, 12.

76. Walker, *supra* note 10, at 57.

77. *Id.*

78. *Id.* at 58.

79. Lawrence W. Sherman, *The Sociology and Social Reform of the American Police: 1950–1973*, 2 J. POLICE SCI. & ADMIN. 255, 256 (1974).

with responding to a sense of crisis.[80] His Commission on Law Enforcement and the Administration of Justice reported back in February 1967 after gathering most of its data in 1965 and 1966.[81] Crime was on the rise, but the due process reforms Stuntz criticized in *The Collapse* had just begun and had yet to have much impact on the ground. For the most part, this was still the world viewed rather favorably in *The Collapse*, the world in which criminal justice "worked" because rates of crime and imprisonment, and disproportionate black incarceration, were quite low by today's standards.

Contemporaries did not hold such a benign view. In its national survey, the Johnson Commission found that "crime . . . and the fear of crime have eroded the basic quality of life of many Americans. . . . One-third of a representative sample of all Americans say it is unsafe to walk alone at night in their neighborhoods."[82] Unfairness was rampant and "[t]he Commission found overwhelming evidence of institutional shortcomings in almost every part of the United States."[83]

Even in 1965, police training was limited; less than half of cities with populations between 100,000 and 250,000 people provided recruits with more than five weeks of training.[84] In the courts, the failings that had been noted thirty and forty years before persisted. Prosecutors and judges still relied on information systems "designed originally for small, rural communities" where "the parties involved . . . often know each other," and as a result decisionmakers "seldom know anything at all about a defendant's background [or] character."[85] In the lower courts, "cramped and noisy courtrooms, undignified and perfunctory procedures, and badly trained personnel [led to] the impossibility of devising constructive solutions to the problems of offenders."[86]

In sum, the relatively attractive portrait of this era's criminal justice process sketched in *The Collapse* is in tension with a sizeable body of evidence. Those who studied their own systems at the time did not think that typical case outcomes were a product of considered leniency. Rather, they considered the case dispositions to be the result of hasty, haphazard procedures, incompetent staff, and the inability to access relevant information. They saw their systems as badly dysfunctional.

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80. 1967 CRIME COMM'N, *supra* note 10, app. A at 311.

81. *Id.*

82. *Id.* at v.

83. *Id.* at viii.

84. THE PRESIDENT'S COMM'N. ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 11 tbl.6 (1967) [hereinafter PRESIDENT'S COMM'N TASK FORCE REPORT].

85. 1967 CRIME COMM'N, *supra* note 10, at 127.

86. *Id.* at 128.

D. *Looking Back on the Pre-1960 Critiques*

Is there good reason to doubt these contemporary assessments of informality and localized political control? In retrospect, we know that the elites of the period, in their abhorrence of discretion and faith in expertise, were "hopelessly naïve."[87] In seeking to rely so heavily on "scientific management,"[88] they undoubtedly failed to allow for justified discretion and legitimate willingness to forego full enforcement of every law. Nonetheless, their argument for specialization, greater professionalism, and substantial insulation from politics cannot fairly be questioned; the observers on the scene documented in compelling detail the need for these steps.[89]

By the 1920s, the larger cities of the Northeast and Midwest had become complex, dynamic, and heterogeneous.[90] By the 1950s, cities throughout the nation were changing in the same way. Even the small precincts within these cities typically had little in common with rural towns of comparable population. Unlike those somewhat self-contained societies where families lived together for generations, America's urban districts were increasingly marked, as they are today, by anonymity and constant change.[91] Mutual interdependence[92] required frequent interaction among adjacent neighborhoods and with the central business district. Police departments needed specialized units, and their generalists—the patrolmen—also required special training to maintain order on densely crowded streets used by many people they could not possibly know personally.[93] And except with respect to certain quality-of-life offenses, local independence in setting enforcement policy was precluded by citywide social and economic

87. Walker, *supra* note 10, at 54.

88. For the classic exposition of the "scientific management" theory, see FREDERICK WINSLOW TAYLOR, SCIENTIFIC MANAGEMENT *passim* (Routledge 2003) (1947). For a discussion of Taylor's influence on thinking about police administration during this period, see Sherman, *supra* note 79, at 256.

89. *See* Walker, *supra* note 10, at 56–59 (describing the extensive field research documenting the need for reform of the criminal justice system).

90. *See* Fosdick, *supra* note 18, at 6–7, 55 (describing Cleveland in the early 1920s as "a city of strangers" and noting the instability of neighborhoods, with influxes of new population groups and "instances of rapid change" from one kind of neighborhood to another).

91. *See* Parker, *supra* note 72, at 5–6 (describing heterogeneity and "fast-paced social and economic turmoil" in large American cities of the 1950s and contrasting that situation with "the relatively stable pattern of rural life"); *cf.* Fosdick, *supra* note 18, at 6–7 (describing urban conditions in the 1920s).

92. *See* Parker, *supra* note 72, at 5 (describing interdependence of residents in large American cities in the 1950s).

93. *See* Parker, *supra* note 72, at 5–6, 10 (describing the complexity of order maintenance among heterogeneous groups "even [with respect to] their very movement on the streets" and the need for special training for officers to perform their "diverse and highly technical" duties).

interaction, which caused the effects of crime and punishment to spill over across neighborhoods.[94]

Moreover, each of the larger cities needed—and had—more than a thousand police officers, along with dozens of prosecutors and numerous judges.[95] To imagine that organizations of this size can be governed by local political units or managed by memory and personal relationships is more than unrealistic. It was—and would be again—a recipe for disaster.[96]

Although America's pre-1960 criminal justice institutions were gravely flawed, Stuntz is nonetheless correct about one salient point: levels of crime and imprisonment were both relatively low. Crime rates did not seem low to contemporaries, but they were far lower than those we have faced in the post-1960, post-reform era.[97] And these features alone could conceivably redeem criminal justice arrangements that were badly dysfunctional in other respects.

Informal, democratically responsive structures had coincided with relatively low rates of crime, and Professor Stuntz insists that the correlation between subsequently rising crime rates and the collapse of local democracy was "more than coincidental" (p. 7). "[A] locally run justice system," where "residents of poor city neighborhoods" had a greater ability "to govern the police officers and prosecutors who govern them," resulted in a criminal justice system that "was more lenient, more egalitarian, and more effective

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94. *See* Bettman, *supra* note 60, at 155–57 (discussing how geographical division of authority within law enforcement impedes crime control); *see also* Parker, *supra* note 72, at 5–6 (discussing law enforcement problems in light of the "social and economic turmoil" of large cities).

95. *See* 1967 CRIME COMM'N, *supra* note 10, at 106, 113 (noting that in the mid-1960s large cities averaged 2.3 police officers per thousand residents, i.e. a force of over a thousand police officers for a city of half a million people, and that New York City at that time had twenty-eight thousand police officers); Lee Silverstein, *Manpower Requirements in the Administration of Criminal Justice*, *in* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 152, 156 (1967) (presenting survey data showing that in the early 1960s, Los Angeles had 178 assistant prosecutors and most American counties with over a million residents had 30 to 100 assistant prosecutors); *cf.* Fosdick, *supra* note 18, at 6 (noting that the Cleveland police force in the 1920s numbered 1,381 officers, including 1,125 patrolmen); Smith & Ehrmann, *supra* note 27, at 252–53 (noting that Cleveland in the 1920s had a dozen common pleas judges and ten municipal court judges). Many courts, however, were notoriously short of judges. *See* 1967 CRIME COMM'N, *supra* note 10, at 128 (acknowledging "the gross disparity between the number of cases and the personnel" in many lower courts and noting that prior to 1967, the District of Columbia Court of General Sessions had only four judges to process thousands of cases per year).

96. *See, e.g.*, WICKERSHAM COMM'N, REPORT ON POLICE, *supra* note 46, at 1–2 (noting that the administrative structures prevalent in law enforcement would soon lead to bankruptcy in any corporate business similar in size to an urban police force); Frankfurter, *supra* note 13, at vi (noting that by the 1920s, law enforcement methods and machinery that worked well in early America had turned into "a menace"). *See generally supra* Sections II.A–C.

97. For the concern of contemporary observers with regard to crime levels in their own eras, see *supra* text accompanying notes 15, 17–20 (Cleveland and other cities in 1920); *supra* text accompanying note 48 (America in the late 1920s); and *supra* text accompanying note 81 (America in the mid-1960s). For data on crime rates in the post-reform era, see *infra* text accompanying notes 126–128.

than today's version" (pp. 7, 9). Even if the pre-1960 institutions worked poorly in many ways, Stuntz still might be right in arguing that our system became more punitive, more discriminatory, and less effective *because of* the post-1960 reforms. If so, he might also be right that we could reverse these consequences, in part, by restoring the "large dose of local democracy that once ruled American criminal justice" (p. 8). The next Part examines this causal claim.

III. After 1960—Did Reform Contribute to Our Current Predicament?

The Collapse targets three distinct post-1960 developments: professionalization of policing and prosecution, steps to strip the substantive law of its moral blame requirement, and the Warren Court's procedural due process reforms. Stuntz then links these reforms to sharp jumps in plea bargaining, crime, imprisonment, and discrimination (p. 7). To clarify this narrative, it will help first to set aside two of its contentions—that after 1960, reformers made blame much less prominent and that guilty pleas became much more prominent.[98] Sections III.A and III.B demonstrate that these two factual claims are at odds with the great weight of the evidence. The rest of Stuntz's post-1960 picture, however, is descriptively accurate, and he offers a compelling account of its human costs. If the reforms of the 1960s are in part responsible for this tragedy, as Stuntz insists, the implications are momentous. But as the remaining Sections of this Part show, that claim is difficult to reconcile with the evidence.

A. *De-emphasis of Moral Blame?*

As part of his skepticism toward elitist reform, Stuntz argues in *The Collapse* that "[t]he law professors who wrote the Model Penal Code helped to replace a system of legal doctrine that worked with one that didn't" (p. 194). Under pre-reform laws, the book asserts, strict liability was disfavored, criminal codes left broad scope for open-ended arguments of substantive innocence, and "[p]roof of criminal intent meant proof of moral fault, not just the intent to carry out one's physical actions" (pp. 140–41, 349 n.29). Reformers, the book claims, pushed to create many more offenses that were easily proved and sought to narrow the requirement of blameworthiness, so that "the concept of wrongful intent . . . has gone by the boards."[99] This alleged change in substantive law then helped to shift influence over punishment from grassroots preferences to distant legislatures and professional prosecutors.[100]

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98. *See* pp. 260–64.

99. P. 260 ("The most important change may have come in . . . the law of *mens rea*. . . . Traditionally, that body of law required proof that the defendant acted with a state of mind that was worthy of moral blame. . . . But for the most part, [that] concept of wrongful intent . . . has gone by the boards.").

100. *See* pp. 257–65.

Many examples can be found to support these generalizations, but on the whole, the substantive criminal law has moved primarily in the opposite direction. To be sure, our statutes today include more *mala prohibita* offenses than in the past: regulatory laws against behavior that is not inherently immoral have proliferated. But this development reflects the greater complexity of our economy and the greater speed and power of industrial processes. It also reflects our better understanding of the health and safety implications of unregulated conduct.[101] It is an inherent consequence of modernity, not primarily a policy choice that could have been avoided.[102]

In any case, there can be no doubt about the work of "[t]he law professors who wrote the Model Penal Code" (p. 194). The Code launched "a frontal attack on absolute or strict liability"[103] and replaced loose concepts like "general intent"—often read to require no moral blame—with carefully defined mental elements.[104] It also created a robust presumption that we must, if possible, interpret penal statutes to require a mental state with clear-cut moral content—at a minimum a "conscious[] disregard[] [of] a substantial and unjustified risk [of harm] . . . . involv[ing] a gross deviation from the standard of conduct [of] a law-abiding person."[105]

Supreme Court jurisprudence has likewise moved toward stronger culpability requirements. At the turn of the twentieth century and for several decades thereafter, strict liability was the prevailing interpretive presumption, especially for new regulatory statutes;[106] more recently, the Court has generally insisted on interpreting federal felony statutes to require awareness of wrongdoing.[107] And for homicide cases, where Stuntz argues that jury culpability judgments were a crucial path to leniency before 1960, the

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101. *See* Stephen J. Schulhofer, *The Future of the Adversary System*, 3 JUST. Q. 83, 83–84 (1986) (arguing that technological advances that increase the risk of "individual or social injury" necessitate regulation).

102. To be sure, regulatory prohibitions need not be enforced by the criminal law, and one can argue that penal sanctions normally should be reserved for conduct that is *mala in se*. But this does not appear to be the objection asserted in *The Collapse*, and it raises many broader complications. Suffice it to say that there appears to be no moral reason why criminal sanctions should not attach to the knowing violation of *mala prohibita* rules.

103. MODEL PENAL CODE § 2.05 cmt. 1 (1985).

104. *Id.* § 2.02 cmt. 1.

105. MODEL PENAL CODE § 2.02(2)(c), (3) (1962).

106. *See, e.g.*, United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250 (1922). Stuntz claims that strict liability was uncommon in the earlier era and presents *Balint* as the exception that proves the rule. *See* p. 349 n.29. But he offers no examples of cases that represent what he considers to be the prevailing view. The evidence suggests, to the contrary, that *Balint* was not an exception but rather was typical for its day. *See* Morissette v. United States, 342 U.S. 246, 254–58 (1952) (discussing strict liability as the prevailing view for "public welfare" offenses).

107. *E.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Staples v. United States, 511 U.S. 600 (1994); Liparota v. United States, 471 U.S. 419 (1985); *Morissette*, 342 U.S. 246.

open-ended mens rea assessments that substantive law traditionally required remain in place with no significant change.[108]

The charge that reformers sought to multiply the prosecutorial arsenal of easily proved crimes (p. 263) likewise can be supported by some examples, but again, much of the evidence is to the contrary. From the early 1900s through the 1950s, the substantive law punished a staggering variety of moralistic offenses. The elite reformers led the charge against it. An analysis in the 1920s lamented that in a typical city, "police were expected to be familiar with and enforce 30,000 [f]ederal, [s]tate, or local enactments!"[109] Later academics criticized the same evil,[110] and in the 1950s, the Model Penal Code—well ahead of its time—eliminated criminal punishment for sodomy, adultery, fornication, and consensual same-sex adult relationships.[111] Whatever other criticisms one might level at the professionals who pushed for reform after 1960, neglect of substantive culpability is not one of them.

B. *A Surge in the Guilty Plea Rate?*

It is easy to see how an observer might believe that guilty pleas have soared since the 1960s. Statistics prior to that period were not compiled systematically, and some of the available data show plea rates lower than today's. Thus, *The Collapse* contrasts 1962 data showing that "roughly two-thirds" of felony convictions were obtained by guilty plea to 2006 data putting that rate at 96 percent.[112] A surge of this magnitude, if well substantiated, would indeed be a dramatic and worrisome development.

Such contrasts can be flawed, however, when they aggregate plea rates across jurisdictions, especially when, as in *The Collapse*, the studies compare different sorts of jurisdictions. *The Collapse* juxtaposes the 1962 average for twenty-eight mainly nonurban counties with the 2006 average in America's seventy-five largest counties—not a safe basis for establishing a trend. Indeed, in the same 1962 study that Stuntz cites for evidence of low plea rates in that year, a broader data base, covering all fifty states and the District of Columbia, showed that guilty pleas in 1962 accounted for 67% of *all* dispositions—including dismissals and acquittals. After

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108. If anything, the law has broadened the avenues for mitigation and acquittal through the more flexible treatment of battered spouse syndrome ("BSS") that emerged in the early 1980s, *see, e.g.*, State v. Kelly, 478 A.2d 364 (N.J. 1984), and the now-prevalent legislative mandate to admit BSS testimony as evidence of self-defense, *see* SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 844 (9th ed. 2012).

109. PRESIDENT'S COMM'N TASK FORCE REPORT, *supra* note 84, at 77 (referring to a study of the 1914–1929 period).

110. *See, e.g.*, Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967).

111. MODEL PENAL CODE §§ 207.1, 207.5, at 205–10, 277–79 (Tentative Draft 1955); Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 673–74 (1963).

112. Pp. 32, 326 n.56 (citing LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 93 (1965)).

excluding the dispositions by dismissal and acquittal, the 1962 guilty-plea rate—as a percentage of convictions—was 85% or more in thirty-seven states and was at least 90% in twenty-four states,[113] not much less than the 96% rate we see in urban jurisdictions more than forty years later.[114]

Observers have mourned "the vanishing jury" for almost a century. Raymond Moley gave that title to an article he published in 1928 after encountering plea rates of at least 75% in eighteen of the twenty-four cities he surveyed and rates at the 90% level in five of them.[115] In Cleveland, the felony guilty-plea rate had reached 77% as early as 1920.[116] By the 1950s, one study found that guilty pleas nationwide accounted for "roughly 90[%] of all criminal convictions."[117] And the president's 1967 Crime Commission, reporting 1964 data, put the nationwide guilty plea rate at 87% of convictions.[118] The evidence, therefore, does not support *The Collapse*'s claim that guilty pleas accounted for only two-thirds of convictions in the early 1960s or that such pleas have surged dramatically since. At most, any increase seems to be on the order of a 5% shift (roughly from 90% to 95%) over this fifty-year period.

It must be stressed, moreover, that any increase since 1960 cannot in any event be considered a distinctive, post-1960 development. Guilty plea rates have been rising, more or less steadily, since the Civil War or earlier,[119] an

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113. *See* SILVERSTEIN, *supra* note 112, at 92–93 tbl.27. The report does not indicate the proportion of trial adjudications ending in conviction. But if we assume that roughly two-thirds of trials end in conviction, the guilty plea rate as a percentage of convictions for each state can be estimated by dividing the portion of the total caseload estimated to end in conviction (the sum of the guilty plea percentage plus two-thirds of the trial percentage) into the guilty plea percentage. This procedure yields an estimated guilty plea rate of 80 percent or more for forty-three of the fifty-one jurisdictions, 85 percent or more for thirty-seven, 90 percent or more for twenty-four, and 95 percent or more for twelve.

114. P. 139. *The Collapse* further supports its claim of plummeting trial rates by contrasting the same 96 percent rate for 2006 to a 63 percent rate for 1880–1910 in Alameda County, California. P. 139. But since that county's population averaged only 155,000 during those years, *see* LAWRENCE FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE 21 tbl.2.1 (1981), this jurisdiction also affords an unsatisfactory point of comparison to the largest counties today.

115. *See* Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 105 (1928).

116. *See supra* text accompanying note 41.

117. DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 8 (Frank J. Remington ed., 1966) (reporting American Bar Foundation field surveys conducted 1956–1957); *id.* at 45 (stating that up to 90 percent of defendants in federal courts plead guilty).

118. TASK FORCE REPORT: THE COURTS, *supra* note 95, at 9 (discussing other estimates that "guilty pleas account for 90 percent of all convictions; and perhaps as high as 95 percent of misdemeanor convictions" (footnote omitted)).

119. *See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH 8 (2003) ("[P]lea bargaining in New York [State] began its long rise in the first half of the nineteenth century and . . . reached near-modern proportions by [the nineteenth] century's end); *id.* at 12, 113, 291 n.8 (reporting that in Massachusetts, plea bargaining began to rise before 1810 and reached 87% of adjudications, and thus presumably about 90% of convictions, by 1900); Moley, *supra* note 115, at 108 (reporting that in rural and urban counties of New York State, guilty pleas grew from 15–35% of convictions in 1839 to 90% of convictions in 1926).

evolution that is best understood as reflecting personal and institutional incentives which are well entrenched and independent of particular doctrinal arguments available to prosecutors and defendants.[120] In short, the evidence does not support Stuntz's claim that increases since 1960—if any—have been a departure from the trend. There is no reason to suspect that a causally significant new event had occurred.

C. *Where Conditions Did Deteriorate, Was Reform Partly Responsible?*

The most striking argument of *The Collapse* is Stuntz's claim of a link between diminished local control and judicial reform of procedure on the one hand, and soaring rates of crime, imprisonment, and discrimination on the other. Although *The Collapse* allows that the two sets of developments might be merely coincidental (p. 7), Stuntz's overall insistence on a causal connection is unmistakable.[121] And the policy preferences that drive Stuntz's narrative—his call to resist professionalization, roll back Warren Court procedural reforms, and allow local neighborhoods to "exercise more power . . . as they once did" (p. 283)—rely on that causal premise.

Stuntz does not claim that crime rose because Warren Court decisions handcuffed the police or otherwise undermined deterrence.[122] But he insists on linking the rise in crime to diminishing local control. Once crime rose, increases in harsh, discriminatory punishment were possibly inevitable, but, Stuntz argues, Warren Court efforts to protect minorities aggravated that trend. If sound, this analysis requires a radical change in strategy for anyone seeking to mitigate unfairness in criminal justice. Yet these causal claims—that diminishing local control contributed to rising crime and that Warren Court reforms contributed to harshness and discrimination—are dubious. Although one set of events did follow the other, far too much of the evidence is irreconcilable with the claim of a causal link. This Section considers first, the supposed impact on crime; second, the supposed harm to the indigent; and third, the supposed contribution to the surge in imprisonment and discrimination.

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120. See FISHER, *supra* note 119, at 161–204 for thorough documentation of this point. That said, there is little doubt that the Supreme Court's tolerance, or encouragement, of plea bargaining and refusal to place significant impediments in its path, notably in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), helped ensure that this evolution would continue uninterrupted. In *The Collapse*, Stuntz brilliantly dissects *Bordenkircher* and presents a powerful critique of its holding. Pp. 257–59.

121. *See, e.g.*, pp. 26, 29 ("[A]t least three causes seem to have contributed. . . . The third explanation [centralization of political power] may be the most important."); pp. 35–36 ("What political dynamic could produce such . . . outcomes? . . . The core reason is [weakening of local democracy]."); p. 216 ("Earl Warren . . . helped usher in the harsh politics of crime . . . . [These were] unintended consequences . . . ."); p. 218 ("Because [the Warren Court granted defense counsel more legal claims], poorer [defendants] grew more disadvantaged.").

122. That once-common claim is now discredited. *See, e.g.*, Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. REV. 500 (1996).

1. Did Reform Aggravate the Surge in Crime?

The Collapse acknowledges that rising crime had complex causes (p. 26). To help unpack them, it presents a striking comparison between two great migrations to the cities of the North: European immigrants before 1920, and African Americans who moved from the rural South just before and after World War II. In both cases, the influx and resulting social instability could be expected to cause—and did cause—a surge in crime. But "the first [crime wave] was short-lived and mild, the second long-lasting and severe" (p. 17). Why did the second migration lead to much more crime?

Although *The Collapse* recognizes that no single factor produced this difference, it focuses particular attention on "three causes [that] seem to have contributed" (pp. 26–29)—the state of the economy, leniency in punishment, and the waning of local democratic control. The economic explanation is unsatisfying, *The Collapse* argues, because fluctuations in crime show little relation to fluctuations in national economic prosperity (pp. 26–28). Fluctuations in crime also fit poorly with fluctuations in imprisonment rates (p. 28), prompting Stuntz to conclude that something else must have been at work.

That leaves only the third possibility—the decline of local democracy—and Stuntz argues that this explanation "may be the most important" (p. 29). To fill out that argument, he draws attention to empirical research documenting that people are more likely to obey the law when they view the justice system as legitimate:

> [T]hese two very different crime waves are [therefore] less puzzling than first appears. By the late nineteenth century—when crime in immigrant-dominated cities was mostly falling, not rising—working-class immigrants and their offspring largely governed the justice system that governed them. Even today, African Americans have no such power. (pp. 29–30)

That difference was important because, Stuntz argues, when local communities lost power over prosecution and punishment, the perceived legitimacy of the justice system eroded. No longer could crime be "controlled through local democracy and the network of relationships that supported it" (p. 31). In the earlier period, "[c]ops, crime victims, criminals, and the jurors who judged them . . . were not wholly distinct communities. . . . Rage at the depredations of criminals was tempered by empathy for defendants charged with crime" (p. 31). The waning of local democracy ended that tempering process. Crime surged because potential criminals, having lost respect for the system, were more willing to offend, and punishment surged because local democracy was no longer empowered to hold it back (p. 31).

Although this hypothesis could conceivably explain some of the crime increase after 1960, there are reasons to doubt whether it was significant—and especially whether, as *The Collapse* implies, it was so significant that it overshadows everything else worth mentioning. One reason for this doubt is that Stuntz's argument for declining "legitimacy" uses that concept loosely,

largely equating it with features he wants to restore—jury trials and local political control of police and prosecutors. But the research connecting legitimacy to compliance with law lacks that focus and does not test those variables. Rather, it finds that the crucial factor shaping perceived legitimacy is "procedural justice," conceptualized in terms of citizen beliefs that police and other officials know the law and apply it fairly (pp. 83–84). Procedural justice encompasses such matters as whether officials give individuals an opportunity to be heard before taking action, give reasons for their decisions, and treat individuals with respect.[123] And crucially, the research finds that perceptions of whether police officers themselves obey the law strongly shape citizen perceptions of procedural justice.[124]

This research therefore suggests that the Warren Court reforms that *The Collapse* proposes to roll back—in particular, *Miranda*, which requires the police interrogators to warn suspects of their rights and honor their requests to remain silent, and *Mapp*, which is designed to prevent police and prosecutors from profiting from Fourth Amendment wrongs[125]—enhance citizen compliance with the law, rather than weaken it. To be sure, the voice of local politics might be another part of the procedural-justice equation. But given the way local politics operated on the ground prior to the 1960s,[126] we can hardly assume that potential offenders in earlier periods—especially young male migrants—were treated with more dignity or felt more empowered to influence their local police and prosecutors.

One way to tease out the impact of local politics is to shift the framework of comparison. In juxtaposing two periods of migration—one that arguably allowed migrants a political voice and another that did not—*The Collapse* compares two eras half a century apart, with enormous differences other than just their approaches to politics. A better procedure to assess whether migrants' access to political power affected crime rates would be to compare *simultaneous* crime trends in jurisdictions *differing* in their experiences of migration. For example, we could take 1950–1980 crime trends in the Northeast and compare them with crime trends during the same time in other parts of the country. Of course, the regions still differ in many

123. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 96–97, 129 (1990) (judgments about procedural justice (and hence legitimacy) depend on police impartiality and whether an officer considers the citizen's views before acting); Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 346 (2011) (perceptions of procedural justice are shaped by whether police are consistent and courteous, and whether they give people they encounter an opportunity to be heard); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 519, 542, 546–47 (2003) (assessing judgments of procedural justice based on whether police treat people fairly, equally, and with dignity).

124. *See* Schulhofer et al., *supra* note 123, at 358, 363 (police disregard for law undermines perceived legitimacy); Sunshine & Tyler, *supra* note 123, at 542, 546 (judgments of procedural justice significantly shaped by whether police understand the law and make decisions based on facts).

125. *See* Schulhofer et al., *supra* note 123, at 358, 362–63.

126. *See id.* at 338–39.

respects, but confounding social and economic factors will be far less dramatic if we compare jurisdictions that are contemporary in time.

Figure 1 takes this approach and compares 1950–1980 crime trends in the Northeast to crime trends over the same period in the South and West. In the latter regions, crime-rate increases in the 1950s were actually more dramatic than in the Northeast. After 1966 they track the Northeastern pattern almost exactly.[127]

This regional comparison may, however, be insufficiently sensitive, because some cities in the South and West also experienced significant population shifts. The African American population of Atlanta, for example, grew from 38% in 1960 to 51% in 1970 and to 67% in 1980.[128] If Atlanta was experiencing a surge in crime similar to that occurring in the Northeast, the explanation could simply be that it was also experiencing a surge in migration similar to that occurring in the Northeast.

A more fine-grained test of the migration thesis of *The Collapse* therefore must focus on cities that did not experience a substantial influx of African Americans or other minorities during the period. Figure 2 permits that assessment by comparing the Northeast to cities where the minority population was stable or even declining—Birmingham, Charlotte, Jacksonville, and Memphis.[129] As Figure 2 shows, the crime-rate patterns in these cities where there was no significant influx of minorities look virtually identical to the crime-rate patterns we see in the migration-impacted Northeastern cities featured in *The Collapse*. And of course the African

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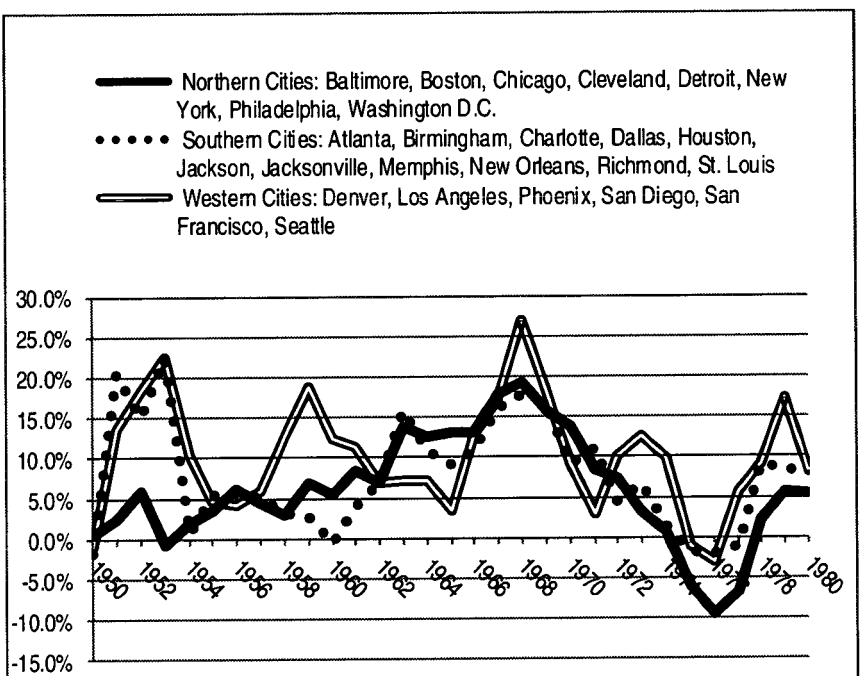
127. *See infra* Figure 1. The volatility of crime rates in the South and West is probably attributable in part to the fact that cities in those regions were on the whole much smaller than those of the Northeast, especially during the 1950s and 1960s. Because small cities have relatively few non-negligent homicides, random variation in the absolute number of such killings annually has a large impact on the percentage change. For example, Jackson, Mississippi had three murders and non-negligent manslaughters in 1951, 22 U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 95 (1951), eighteen in 1952 (a 500 percent increase), 23 U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 101 (1952), and eight in 1953 (a 56 percent decrease), 24 U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 98 (1953). The graph's three-year moving average tempers such fluctuations but cannot eliminate all of them. *See infra* Figure 1.

128. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for Large Cities and Other Urban Places in the United States* 2 tbl.11 (U.S. Census Bureau, Population Division, Working Paper No. 76, 2005). For convenience, comprehensive data on minority population for the major U.S. cities are on file with the *Michigan Law Review* and available in an Appendix published with the online version of this Article. For the Atlanta data cited above, see Appendix tbl.1.

129. *See infra* Figure 2. The African American share of the population for each of the decennial years from 1950–1980 was: Birmingham, 40%, 40%, 42%, 56%; Charlotte, 28%, 28%, 30%, 31%; Jacksonville, 35%, 41%, 22%, 25%; and Memphis, 37%, 37%, 39%, 48%. See Appendix, *supra* note 128, tbl.1. Jackson, Mississippi, which also had a stable black population during this period, is excluded from Figure 2 because its low absolute number of homicides produces great volatility in homicide-rate changes. *See supra* note 127. Allowing for that volatility, comparisons including Jackson are largely identical to those illustrated by Figure 2. Space limitations prevent publication of additional graphs here, but to ensure against cherry-picking of the data, graphs depicting the cities individually and in other combinations are available in the online Appendix to this Article.

American communities of these Southern cities faced none of the decline in political power that police professionalism brought to the North in the period prior to 1950; in the 1950s, as in the 1920s, these African American communities in the South had no appreciable political power to lose.[130]

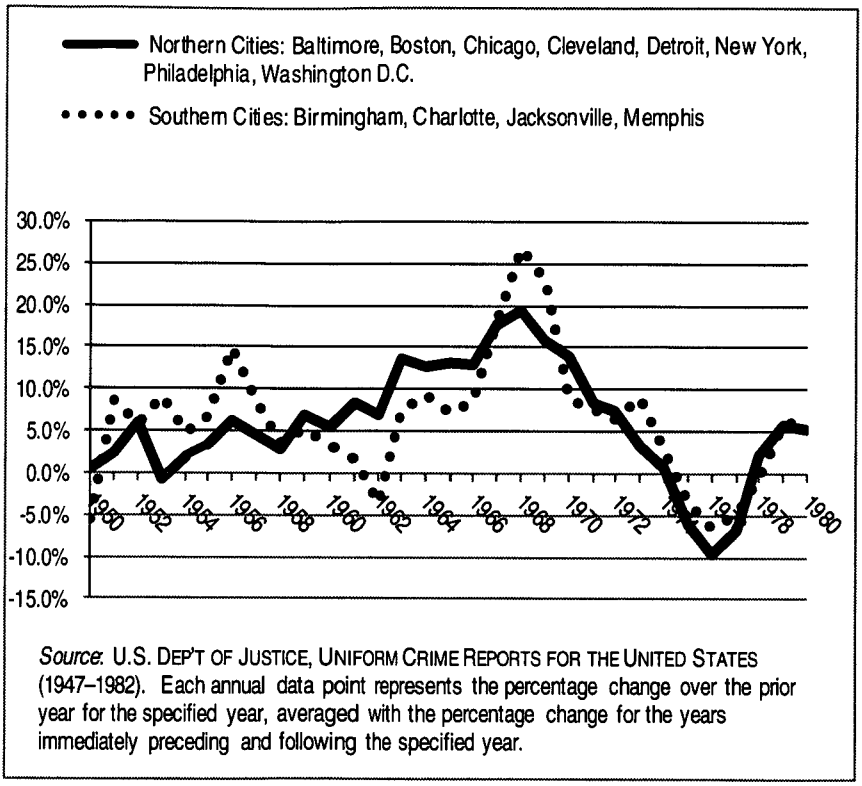
FIGURE 1
HOMICIDE RATES
PERCENT CHANGE OVER PRIOR YEAR (THREE-YEAR MOVING AVERAGE)
NORTHERN VS. SOUTHERN & WESTERN CITIES



Source: U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES (1947–1982). Each annual data point represents the percentage change over the prior year for the specified year, averaged with the percentage change for the years immediately preceding and following the specified year.

130. In its discussion of Southern justice, *The Collapse* provides compelling illustrations of this point. *E.g.*, pp. 145–47.

FIGURE 2
HOMICIDE RATES
PERCENT CHANGE OVER PRIOR YEAR (THREE-YEAR MOVING AVERAGE)
NORTHERN CITIES VS. BIRMINGHAM, CHARLOTTE, JACKSONVILLE, MEMPHIS



Source: U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES (1947–1982). Each annual data point represents the percentage change over the prior year for the specified year, averaged with the percentage change for the years immediately preceding and following the specified year.

It is therefore difficult to attribute so much importance to possible contrasts in the political power of different migrant groups. It seems far more likely that new developments, operating nationally in the 1960s but not earlier, account for the late-twentieth-century surge in crime. And in fact, powerful developments not present earlier in the century struck the nation with great force after 1960. Extraordinary demographic change abruptly and dramatically destabilized law enforcement and inner-city social structure; there were diminishing needs for unskilled labor, as well as unprecedented mobility, an equally unprecedented concentration of poverty, and the weakening of traditional family arrangements. Each of these changes represents a substantial story in itself, but a brief account is essential if we are to understand the low-crime, low-punishment world that preceded the 1960s—and why it disappeared so suddenly.

Consider the demographic changes.[131] During the attractive low-crime, low-punishment era of the 1940s and 1950s, young males, the most crime-prone segment of the population, were an unusually small cohort, a result of exceptionally low birth rates during the Depression and World War II. When the economy rebounded and millions of veterans returned home after many lonely years overseas, it was not hard to foresee a baby boom. It was likewise not hard to foresee that, fifteen years later, the nation would experience a boom in its population of crime-prone teenagers. Indeed, the country faced an onslaught, with the high–crime age brackets swelling by 1.3 million young people each year during the 1960s; the increase during those ten years "was greater than the growth in [that] segment of the population for the rest of the *century* put together."[132] The surge in crime was predictable and predicted.[133]

One puzzle is that the age shift after 1960 does not account for *all* of the rise in crime.[134] If the waning of local political control did not play a role in pushing crime rates higher, why did public safety deteriorate more drastically than demographers expected? James Q. Wilson suggests, tentatively but persuasively, that the explanation involves "critical mass": the number of young people, and thus the number of offenders, grew so fast that social institutions were overwhelmed.[135] "[W]hen an increase in that mass [of young persons] is sudden and large, a self-sustaining chain reaction is set off that creates an explosive increase in the amount of crime, addiction, and welfare dependency. . . . The institutional mechanisms which could handle problems in ordinary numbers were suddenly swamped . . . ."[136] By the end of the 1960s, narcotics-related deaths in New York City had increased twelvefold, and heroin usage in Atlanta and Boston was ten times higher than it had been before 1963.[137]

Another crucial factor was the decreasing demand for unskilled labor.[138] Although the economy was thriving in the 1960s, African Americans were poorly placed to benefit.[139] Compared to European immigrants of the earlier era, African Americans in the 1960s faced not only more intense discrimination but also a job market increasingly unreceptive to untrained, undereducated workers.[140] The inner-city poor of the two periods therefore differed considerably in their access to economic opportunity.

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131. *The Collapse* mentions that the Baby Boom of the late 1940s contributed to the crime surge of the 1960s but does not pursue this point or consider it as a possible reason for the contrasting patterns of crime during the two migrations. P. 20.

132. JAMES Q. WILSON, THINKING ABOUT CRIME 20 (rev. ed. 1983).

133. *See* 1967 CRIME COMM'N, *supra* note 10, at v–vi.

134. JAMES Q. WILSON, *supra* note 132, at 23–25.

135. *See id.* at 24–25.

136. *Id.*

137. *See id.* at 16–17.

138. WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED 41 (2d ed. 2012).

139. *Id.*

140. *Id.* at 141–42.

Other forces were also likely at work. One simple but crucial development was cars—more of them to steal, to transport drugs, to support predatory crime in distant neighborhoods and to enable quick getaways. In 1910, near the end of the European migration, there were only 5 motor vehicles for every 1,000 U.S. residents; in 1920, when unrestricted European immigration ended, there were still only 76 per 1,000.[141] Even in 1950, when motorized patrol was widespread for the police, the public at large had only 266 vehicles per 1,000.[142] Yet, by the end of the 1970s, the 1950 figure had doubled to nearly 527 per 1,000.[143] It would be too simple to suggest that this factor alone made crime control twice as difficult, but its importance is not difficult to see.

Another powerful influence was the precipitous deterioration of the social structure of inner-city neighborhoods. Starting in the 1960s, highway construction, prosperity, and more cars opened the suburbs to middle-class and lower-middle-class city dwellers. They moved en masse, leaving a sudden and unprecedented concentration of the poor in the inner cities.[144] The impact on predominantly African American neighborhoods was especially strong because antidiscrimination policies were rapidly reducing barriers to residential mobility and prompting "a steady out-migration of middle- and working-class [black] families."[145] The contrast to the low-crime, low-punishment eras before 1960 had important consequences. During the 1920s and even the 1950s, black communities had "featured a vertical integration of . . . [l]ower-class, working-class, and middle-class black families . . . ."[146] In the 1960s, this economic integration quickly began to disappear, producing what William Julius Wilson has called "concentration effects" and "social isolation."[147] Inner cities in the late 1960s, unlike their predecessors, lacked the "social buffer" that tempered the impact of joblessness, provided "mainstream role models," and sustained norms of hard work and law-abiding behavior.[148]

Changes in family structure were also devastating. Single-parent, female-headed households are especially vulnerable to poverty, an important risk factor for crime.[149] Fortunately, "In the early twentieth century the vast majority of both black and white low-income families were intact."[150] But later, as plummeting demand for unskilled labor drove up joblessness among African American males (from 20% in 1930 to 44% in 1983), the

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141. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 77–78 tbl.HS–41 (2003), *available at* http://www.census.gov/statab/hist/HS–41.pdf.

142. *Id.*

143. *Id.*

144. WILLIAM JULIUS WILSON, *supra* note 138, at 54–55.

145. *Id.* at 56.

146. *Id.* at 7.

147. *Id.* at 58, 61.

148. *Id.* at 56.

149. *Id.* at 26–29, 71.

150. *Id.* at 63.

number of African American men able to support a family tumbled, and the number of single-mother households soared—from 18% of African American families in 1940 to more than double that figure—42%—in 1983.[151]

In short, staggering socioeconomic change struck American cities after 1960. It happened in a breathtakingly short period. And the new conditions were powerfully criminogenic: a skyrocketing youth population; sharply rising rates of drug abuse and addiction; plunging demand for unskilled labor; greater physical and social mobility; the erosion of economic-class integration in neighborhoods; the concentration of poverty; weakening of the family structure; and the disappearance of mainstream role models for young people. With so much dramatic change affecting the inner-city social structure so rapidly, there is little reason to single out the waning of neighborhood political power as a major causal factor in the rise of crime. The same social forces were at work nationally, and indeed internationally, with the same effects—whether or not a jurisdiction experienced a decline in localized control of law enforcement: "[T]he two decades after 1960 .... coincided, more or less exactly, with a rapid and sustained increase in recorded crime rates—not just in the USA and the UK, but in every Western industrialized nation."[152]

This background also casts light on the broader themes of *The Collapse*. Whatever may be the attraction of localized democracy under the social conditions of 1920 or 1950, we cannot assume that such politics would work equally well in the 1970s or today. And a city's ability, before 1960, to control crime through informal institutions without harsh punishment tells us very little about the capacity of such institutions to succeed under the conditions that took hold so quickly thereafter.

2. Did Reform Undermine Defense of the Poor and the Innocent?

The Collapse also insists that, as a result of elite reforms, the justice system became *less* fair to suspects who are indigent or wrongly accused. In a book filled with counterintuitive claims, this is one of the most surprising. But Stuntz rests his argument on straightforward economic logic. In a chapter entitled "Earl Warren's Errors" (Chapter Eight), Stuntz contends that because new procedural rights made prosecutions harder to win, states compensated by withholding funds for indigent defense and by ramping up punishment—in part to induce guilty pleas more easily. To make matters worse, Stuntz argues, the new procedural rights fail to focus on factual guilt and are relatively inexpensive to litigate. Thus, in a world of limited resources, attorneys will "inevitably" allocate more time to procedural

151. *Id.* at 65, 82.

152. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 90 (2001). In a later chapter, *The Collapse* mentions briefly that "[l]arge social, political, and economic forces lay behind the riots and rising crime that were concentrated in urban black neighborhoods [after the 1950s]." P. 241. But the book does not bring this point to bear on its discussion of possible reasons for contrasting experiences of crime during the two migrations.

defenses, leaving less time for asserting the defendant's innocence (p. 58). The new rights benefit guilty defendants and wealthy defendants, who can afford attorneys to invoke them, leaving the poor and the innocent more disadvantaged than before.

An initial weakness of this causal story, ironically, is its originality—normally a strength in academic work. But in this instance, the causal argument requires us to believe that for more than forty years, practitioners working daily to promote fairness for minorities and the poor have failed to notice that decisions like *Mapp* and *Miranda* had deeply damaged their cause.[153] The civil liberties community, of course, is often divided in its views about constitutional issues. But there is no evidence of significant sentiment in that community for overturning *Mapp* and *Miranda* as a means to help their clientele or to gain traction in the political process. Of course, people on the front lines could be wrong. But Stuntz's argument is rooted in claims about how legal change plays out in the real world. If several generations of civil liberties practitioners have misunderstood those interactions and failed to see where the interests of those they care about really lie, we are witness to false consciousness on a very wide scale. We cannot rule out that possibility, but we have reason to approach the causal hypothesis with skepticism.

More concretely, the logic of Stuntz's argument has large flaws. As an initial matter, the claim that the focus of Warren Court procedural reforms was "not on the accuracy of the defendant's conviction" (p. 230) seems considerably exaggerated, especially when *The Collapse* asserts that the rights to counsel, confrontation, cross-examination, and discovery of exculpatory evidence are not primarily concerned with factual guilt (pp. 227, 229–30). The book does not say nearly enough to defend this view; the reliability of evidence and the accuracy of adjudication are precisely the point of these particular safeguards.[154] With respect to the book's primary targets, *Mapp* and *Miranda*, the unrelated-to-innocence claim is largely accurate.[155] Even

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153. *See* cases cited *supra* notes 4–5.

154. *The Collapse* argues that subjecting lab technicians to cross-examination makes the use of forensic evidence more costly and, thus, inevitably means less reliance on such evidence, despite its "increasing . . . accuracy." P. 227. More explanation is needed to justify the implicit assumptions here—that inability to cross-examine technicians will not affect the accuracy of their reports, and that states, in order to preserve their ability to introduce such evidence, will not allocate additional funds. On counsel, *The Collapse* argues that although "[t]rials with effective defense counsel are more likely to [be] accurate," p. 229, enforcement of that right does not merely identify innocent defendants but "[i]nstead . . . protect[s] *all* defendants harmed by [procedural error]. At best, appellate review of this sort gets at accuracy indirectly. Better simply to ask whether the government proved its case . . . ." P. 230. But asking "whether the government proved its case," p. 230, cannot suffice when ineffective assistance leaves the appellate court with a record that inadequately presents the defendant's side of the story. Without radical change in our methods of appellate review, appellate courts cannot assess innocence directly; they can get at that issue *only* by assessing the integrity of the procedures followed by the trier of fact.

155. Even these decisions often serve substantive innocence because defense attorneys use them for substantive purposes. Since discovery rights are limited, motions to suppress may

so, the argument that these decisions inevitably diverted resources from claims of innocence is weaker than it seems.

First, why posit that defense resources are fixed? Since procedural reform created new issues, private counsel can now raise additional arguments, and expectations of effective assistance shift accordingly. Legislatures allocating money for indigent defense no doubt respond grudgingly to this new norm, and funding has always been shamefully inadequate.[156] But there is no reason to assume that legislatures allocated *no* additional funds—or so little that attorneys were forced to forego promising claims of innocence. The facts on the ground confirm this intuition, and not just in the South. On the eve of *Gideon*,[157] the Philadelphia public defender had a staff of only 6 attorneys.[158] Four years later it had 36 attorneys, 10 investigators, and a social worker; by 1984, the office employed more than seventeen times its pre-*Gideon* contingent—104 attorneys, 12 paralegals, 24 investigators, and 14 social workers.[159] The caseload had grown too, but not by that much![160]

Second, even when resources are fixed and procedural claims are inexpensive to litigate, Stuntz's economic logic fails because it considers only litigation costs, ignoring benefits. Successful suppression motions do not inevitably require dismissal, and a prosecutor convinced of a defendant's guilt will presumably seek some other basis for conviction; a claim of factual innocence, in contrast, means unequivocal victory when it succeeds. And again, the facts bear out this intuition. Motions to suppress rarely affect the disposition of criminal cases;[161] now as before, the overwhelming majority of criminal cases are litigated over issues of factual guilt.[162]

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provide a defense attorney's only opportunity to preview the prosecutor's case and pin down witness testimony; such motions thus become a crucial predicate for preparing substantive defenses. I am grateful to Erin Murphy for calling my attention to this point.

156. *See* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1999 (1992).

157. Gideon v. Wainwright, 372 U.S. 335 (1963).

158. Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1098 n.200 (1984).

159. *Id.* at 1053, 1098 n.200.

160. Philadelphia case filings were only slightly greater in 1984 than in 1967. *Id.* at 1098 n.200. *The Collapse* supports its thesis of declining indigent-defense resources by estimating that, nationally, funding per case fell by 50 percent between 1979 and 1990. P. 256. But this comparison of 1979 to 1990 sets aside the huge growth of indigent-defense spending in immediate response to Warren Court initiatives, as illustrated by Philadelphia.

161. United States v. Leon, 468 U.S. 897, 907 n.6 (1984) (stating that Fourth Amendment violations lead to case attrition in 0.6% to 2.35% of felony arrests; in felony drug cases, case attrition due to the exclusionary rule is "in the range of 2.8% to 7.1%"). The high-end estimate is that *Miranda* violations account for the loss of conviction in 3.8% of serious criminal cases, but closer analysis puts that figure at only 0.78%. Schulhofer, *supra* note 122, at 501–02. Data on unsuccessful motions are not readily available, but prospects for success presumably guide judgments about where to focus defense effort.

162. *The Collapse* insists that procedural rights "have led to massive amounts of litigation." P. 226. While this assessment may be accurate in terms of the cases represented on the Supreme Court docket, it does not seem apt for the million or so felony charges filed each

In sum, the charge that Warren-era reforms tilted criminal justice efforts away from determinations of factual guilt is unconvincing. Both economic logic and the facts on the ground largely point in the opposite direction.

3. Did Reform Aggravate the Surge in Harsh Punishment?

On the issue of punishment severity, the story of reform gone awry again fails to fit the facts. Consider the chronology: The Warren Court revolution was waning by 1968, and Warren left the Court in 1969. One might argue that the Warren era continued at least until the Court's 1972 decision striking down the death penalty.[163] But the forward march of reform had certainly come to a halt by the mid-1970s.[164] And by that time, the volume of crime had soared (Chapter Nine; p. 247, tbls. 9 and 10). Even with punishment policy unchanged, more crime and more prosecutions mean more imprisonment. The development that is crucial for the Stuntz thesis—the ramping up of punishment severity per case—did not begin in earnest until ten to twenty years later.[165] If this was a compensatory response to the due process reforms of the Warren era, it was surprisingly slow to materialize.

Federal mandatory minimum sentences ("mandatories") feature prominently in Stuntz's account of legislative reaction to judicial activism, but again the chronology fits poorly with the causal sequence posited in *The Collapse*. Congress first enacted federal drug mandatories in 1956,[166] at a

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year, 90–99 percent of which do not involve motions to suppress that affect the disposition of the case. *See supra* note 161. To show that defense investigation of factual defenses has become infrequent, *The Collapse* cites a study of defense performance in the 1980s but provides no comparable data suggesting that the allocation of defense effort was different in any earlier period. P. 228.

163. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

164. *The Collapse* argues that "[t]he criminal procedure revolution is not in retreat. More than forty years after Earl Warren retired, it is still advancing." P. 302. This is not plausible. The only examples the book offers are the Court's recent enlargement of confrontation and jury trial rights. P. 302. But these decisions only affect the small minority of cases that go to trial, and in any event they are outweighed by decisions (far too numerous to cite) that began, as early as 1975, to cut back on the *Mapp* and *Miranda* decisions emphasized in *The Collapse*. *See, e.g.*, *Leon*, 468 U.S. 897; Michigan v. Tucker, 417 U.S. 433 (1974); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); *see also* STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 66–69 (2012) (describing the Court's increasing resistance to excluding fruits of an illegal search); *id.* at 61–65, 83–92, 99–114, 122–26, 126–43 (describing the erosion of Fourth Amendment protections against warrantless arrest, stop and frisk, "administrative" searches, surveillance by means of enhanced technology, and government access to information shared confidentially with third parties).

165. *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 201 (1993). Somewhat earlier, in 1973, New York State enacted severe mandatory minimum sentences for certain drug offenses. *Id.* at 207. That law was a response to New York's drug problem, not a broad effort to facilitate prosecution or plea bargaining for violent crimes generally; indeed, that legislation sought to limit plea bargaining. *Id.*

166. Narcotic Control Act of 1956, Pub. L. 84–728, 70 Stat. 567 (1956) (repealed 1970); U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENAL-

time when Supreme Court jurisprudence gave a wide berth to search, seizure, and police interrogation.[167] Then in 1970, at the height of the Nixon-led law-and-order backlash, Congress *repealed* nearly all the federal drug mandatories.[168] Fourteen years later, after the Supreme Court had reinstated the death penalty and relaxed constraints on searches and interrogation, Congress restored those mandatories. They were then reinforced in 1986 and 1988, times when no new procedural rights had been announced but just prior to congressional elections.[169]

Stuntz might argue that initial legislative reactions were overly crude (like the effort to overrule *Miranda*)[170] and that politicians needed more time to find better ways to fight back. Yet the chronology cuts against this hypothesis as well because procedural reform did not simply halt in the mid-1970s; it moved into reverse, and by the mid-1980s, due process rights stood far below their Warren Court high-water mark. Legislatures enacted harsher sentencing policies at a time when decisions like *Mapp*, *Miranda*, and other procedural landmarks had been largely or entirely de-fanged. It is difficult to see the surge in America's punitive policies in the 1980s and 1990s as a compensatory response to new due process constraints that no longer constrained. Other developments at that time are implicated far more directly: disillusionment with rehabilitation and the parole system that spread across the ideological spectrum in the late 1970s, the crack epidemic in the 1980s, and media attention to sensational crimes by repeat offenders in the 1990s.[171]

TIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 5–6 (1991) (mandatory minimums first imposed in Narcotic Control Act of 1956).

167. The Court imposed an exclusionary rule in federal prosecutions in 1914, Weeks v. United States, 232 U.S. 383 (1914), but that rule remained inapplicable to the states throughout the 1950s, *e.g.*, Wolf v. Colorado, 338 U.S. 25, 26 (1949). The substantive Fourth Amendment in federal prosecutions was also far more flexible than it became in the 1960s. *Compare* United States v. Rabinowitz, 339 U.S. 56, 63–64 (1950) (permitting broad power of search incident to arrest), *with* Chimel v. California, 395 U.S. 752, 768 (1969) (overruling *Rabinowitz*); *compare* Olmstead v. United States, 277 U.S. 438, 466 (1928) (holding that the Fourth Amendment does not restrict wiretapping), *with* Katz v. United States, 389 U.S. 347, 352–53 (1967) (overruling *Olmstead*). With respect to police interrogation, see Cicenia v. LaGay, 357 U.S. 504, 509–10 (1958) (upholding admissibility of confession obtained by interrogation after denying express request to consult attorney); Crooker v. California, 357 U.S. 433, 437–39 (1958) (same; death penalty case); Stroble v. California, 343 U.S. 181, 190–91 (1952) (upholding admissibility of confession obtained by interrogation after suspect was slapped and kicked; death penalty case).

168. U.S. SENTENCING COMM'N, *supra* note 166, at 6–7 & nn.14–19.

169. *See* Schulhofer, *supra* note 165, at 201.

170. 18 U.S.C. § 3501 (2006), purporting to overrule *Miranda*, was never invoked by federal prosecutors, and when raised by a district judge *sua sponte*, was held unconstitutional in *Dickerson v. United States*, 530 U.S. 428, 431–32 (2000).

171. *See* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 9 (2003) (noting the public's disillusionment with rehabilitation); Ted Chiricos, *The Media, Moral Panics and the Politics of Crime Control*, *in* THE CRIMINAL JUSTICE SYSTEM: POLITICS AND POLICIES 57–58 (George F. Cole & Mark G. Gertz eds., 7th ed. 1998) (arguing that the

The Collapse suggests a more subtle possibility, however. The crime-control backlash that began in the late 1960s might have occurred anyway, but, the book argues, Warren's procedural reforms generated a politics that entrenched punitive policies for decades (p. 217). Stuntz recounts how Ronald Reagan capitalized on law-and-order sentiment, built the coalition that led to his election in 1980, and produced a majority for Republican crime-control policies that Democrats too were eventually compelled to support (pp. 237–39). Stuntz then insists that "[t]he Warren Court's criminal procedure decisions were crucial to that process" (p. 238). And Warren was indeed attacked as the embodiment of the soft-on-crime liberalism that Republicans opposed (p. 238). So was the Warren Court crucial to Reagan's success, as *The Collapse* claims? Would the electoral outcomes have differed if the Warren Court had never existed?

There is no ironclad way to test this counterfactual, but history offers a natural experiment that sheds light on it. Britain had no equivalent of the Warren Court and no rule mandating suppression of evidence from an illegal search or unwarned interrogation.[172] Its experience makes the no-Warren counterfactual a reality and gives a reasonably good answer to the "what if?" question. The answer is that Britain experienced virtually the same U-turn in its domestic politics at virtually the same time as the United States.[173] Margaret Thatcher became prime minister in 1979 with a "law and order administration" and an agenda that bore striking ideological similarity to Reagan's.[174] Profound structural changes in Western industrial society lay at the heart of these developments, not judicial doctrine.

The Collapse's other claims about the political effects of judicial reform also align awkwardly with this chronology. Stuntz argues that "[t]he last century's changes in . . . criminal procedure . . . made the law a barrier to reform" (p. 308). Stuntz would welcome "the undoing of the vast network of procedural rules the Supreme Court has crafted since the early 1960s" (p. 302) and suggests that in the absence of those precedents, democratic politics would generate more effective safeguards for vulnerable defendants and

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expansion of punitive measures was a response to "moral panic" resulting from media coverage of crack cocaine usage and violent crimes); Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395 (1997) (discussing how highly publicized crimes by repeat offenders led to the passage of punitive statutes such as Three Strikes laws).

172. At the time of *Miranda*, Britain required a warning of the right to remain silent, *see* Miranda v. Arizona, 384 U.S. 436, 486–88, 487 n.57 (1966), but did not mandate exclusion of confessions obtained by violating this rule, *see Developments in the Law: Confessions*, 79 HARV. L. REV. 935, 1093–94 (1966). That remains the law today. *See* David J. Feldman, *England and Wales*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 149, 167, 170–72 (Craig M. Bradley ed., 2d ed. 2007). Britain likewise had and has no rule mandating suppression of illegally seized evidence. *Id.* at 163. In the 1970s, law-and-order concern about defense advantages centered on Britain's rule forbidding comment at trial on the defendant's silence, and the Thatcher government enacted legislation relaxing this prohibition. *See id.* at 166–67.

173. *See* GARLAND, *supra* note 152, at 98–102.

174. *Id.* at 97–102.

restore a world with less imprisonment and more trials (pp. 302–04, 310–12).

The difficulty with this prediction is that we have already tried much of what *The Collapse* proposes, and not just for a few short intervals. For most of the past forty years, our society and our courts have aggressively rolled back the major procedural innovations of the Warren era, either overruling them or leaving them with little practical bite.[175] Criminal justice officials have regained discretion to design more balanced, more creative, and possibly more effective solutions.[176] If Stuntz's theory were correct, we might expect that over the past three decades the political process would have produced measures to relax harsh sentencing policies and better protect civil liberties. Yet despite the law enforcement flexibility that the Burger, Rehnquist, and Roberts Courts have reintroduced, virtually no new procedural safeguards have emerged from the political process, jury trials have not become more common,[177] and punitive policies have not receded—except quite recently (and quite modestly) under the extreme fiscal pressure of the 2008 financial meltdown. We have reason to be skeptical of Stuntz's claim about counterproductive judicial reform because decades of experience have failed to confirm its causal premises.

IV. SOLUTIONS?

The Collapse seeks to guide reform by emphasizing the lessons that flow directly from its historical analysis. "Local neighborhoods," Stuntz argues, "should exercise more power . . . as they once did" (p. 283). "The short answer [for reform] is by making today's style of criminal justice more democratic" (p. 287). And the book offers a wealth of original proposals for achieving this goal—proposals that could well have value even if the book's historical arguments are unconvincing.

Thorough assessment of these proposals would require yet another book review—or several. But Stuntz's suggestions deserve brief treatment here for two reasons. First, the pro-democracy theme that dominates discussion in *The Collapse*—and this Review—should not divert attention from recommendations that can stand on their own merits, independent of the book's case for decentralized political control. Second, and closer to the heart of *The Collapse*, the book's concrete proposals for enhancing local democracy expose the inherent flaws of that project.

Consider first the policy ideas that need not depend on the pro-democracy argument. To address racial disparities, Stuntz urges courts to enforce the Equal Protection Clause more aggressively by overturning

175. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 169, 195 (1976) (plurality opinion) (permitting states to reinstate the death penalty, provided they institute procedures to guide jury sentencing discretion); cases cited *supra* note 164.

176. *See supra* note 164 (describing relaxation of Warren Court constraints on police discretion).

177. *See supra* notes 119–120 and accompanying text (describing steady rise in prevalence of guilty pleas).

sentences when a defendant shows that similarly situated people from other racial groups received less severe punishments (p. 297). Unfortunately, the difficulties of proving that different individuals are "similarly situated" would probably render this remedy ineffective in almost all cases. The same holds true for several other well-intentioned proposals—for example, Stuntz's suggestion that courts hold unconstitutional the underpolicing of minority neighborhoods (p. 291) and bar a pretext prosecution when the government cannot show that other defendants received significant prison time on similar low-level charges (pp. 301–02). These ideas have potential, but the elusive proof they require makes them difficult to implement.

Another of Stuntz's suggestions is more important. Stuntz convincingly demonstrates the need for more resources to support both prosecution and defense.[178] Since voters will meet such a need only when pressured, he urges judges to reinvigorate effective-assistance-of-counsel doctrine, either by ordering states to spend more money on indigent defense or—more realistically—by adopting stringent standards for effective assistance in jurisdictions that fail to meet a minimum level of funding, as determined by "expert commissions."[179] The latter approach is eminently workable, and it lies well within the legitimate domain of the courts.

There is nothing wrong with supplementing a pro-democracy agenda with equal-protection and effective-assistance remedies that strike a different chord. But it is telling that a scholar so skeptical of experts and judicial activism ultimately turned to expertise and ambitious judicial intervention as essential tools in the struggle for criminal justice reform.

More central to Stuntz's book, however, is its ambition to restore political power to local neighborhoods. Yet when it turns to this goal, there is a discontinuity. In earlier chapters, *The Collapse* criticized reforms that delivered control over police and prosecutors to city elites, taking power away from the inner-city districts that often bear the brunt of both crime and punishment.[180] Given that diagnosis, restoring local democracy would seemingly mean undoing the "changes [that] limited the power of residents of poor city neighborhoods . . . . to govern the police officers and prosecutors who govern them" (p. 7); reform presumably would aim to restore each neighborhood's authority to decide how its streets are patrolled, how arrests are made there, and how offenses committed there are prosecuted.

But *The Collapse* makes no such recommendation. The closest it comes is to urge that juries be drawn from the neighborhoods where crimes occur (p. 287). In other respects, it proposes to leave decisionmaking power where it is now—with police chiefs, district attorneys, and judges who are ac-

178. *See* p. 299.

179. P. 299. Going further, and presumably to give localities a strong incentive to follow the expert recommendations, *The Collapse* also proposes that in jurisdictions that do so, "effective-assistance-of-counsel doctrine will not apply." P. 299. This approach would seemingly leave no remedy for a defendant who suffers from the egregious performance of an individual attorney. Stuntz might not have supported such a result without exceptions, but the logic of prioritizing systemic incentives over individual justice leads in this direction.

180. *See, e.g.*, chapters 5–6.

countable to citywide or countywide constituencies.[181] Having previously conceived decentralization as enhancing the power of neighborhoods vis-à-vis cities and counties, the book now largely equates decentralization with enhancing the power of cities and counties vis-à-vis federal and state governments.

For the book's theme—the socioeconomic locus of political power—this shift in its conception of the local—from neighborhoods to cities and counties—is not merely a nuance but the difference between night and day. Cities and counties are rarely, if ever, dominated in their politics by the poor, minority neighborhoods where so much crime is concentrated. Metropolitan counties typically encompass both disadvantaged urban areas and affluent suburbs. New York County (Manhattan) includes some of the poorest neighborhoods in the nation along with some of the wealthiest.[182] And nearly all cities include both prosperous and poverty-stricken residential areas as well as business districts where influential corporations have vital interests. It was for just this reason that earlier chapters of *The Collapse* condemned the migration of decisionmaking authority from high-crime neighborhoods to the city or county level, stressing that "[t]his gives power over criminal justice to voters who have little stake in how the justice system operates" (p. 7). Yet in its proposed solutions, *The Collapse* largely accepts that arrangement and focuses on reallocating power among the city, county, state, and federal levels.

How will changing the distribution of power among these governmental units affect fairness in criminal justice? One of the book's intriguing suggestions is that federal and state governments should share half the costs of local policing—now borne largely by cities—and that cities and counties should share half the costs of incarceration—now borne largely by states (p. 289). This move, the book states, would free the smaller units of government, which generally have more precarious finances, to invest more in policing, and would restrain their impulse to impose harsh sentences that they need not pay for (p. 289). This argument may be right and therefore

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181. *The Collapse* does urge support for the "community policing" and "community prosecution" movements, which encourage officials to build rapport with neighborhood residents and consider their priorities. Pp. 293, 305. But this approach at best gives neighborhoods only a pallid form of influence, far short of control, and since it leaves decisionmaking power with police and prosecutors, it has strong potential to evolve into top-down communication or perfunctory listening sessions. *The Collapse* acknowledges this, pp. 293, 305, and indeed a dominant finding has been that such programs are often little more than a "one-sided, impersonal opportunity for city bureaucrats to manufacture consent" for measures they have already decided to implement. William Lyons, *Partnerships, Information and Public Safety: Community Policing in a Time of Terror*, 25 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 530, 534 (2002); *accord*, SKLANSKY, *supra* note 6, at 83, 118.

182. *See* Amy O'Leary, *What is Middle Class in Manhattan?*, N.Y. TIMES, Jan. 20, 2013, at RE1 ("Household incomes in Manhattan are about as evenly distributed as they are in Bolivia or Sierra Leone—the wealthiest fifth of Manhattanites make 40 times more than the lowest fifth . . . . ").

seems worth exploring, but its effects in practice are unclear and probably unsustainable.[183]

More fundamentally, *The Collapse* offers no reason to assume that affluent voters and powerful economic interests are less likely to dominate politics in cities and counties than at the federal or state level; this is at best an open question with answers likely to vary from one locality to another. So why doesn't *The Collapse* follow the logic of its diagnosis and urge a more significant shift in political authority—from the city or county level back to the local neighborhoods?

It is not difficult to imagine the reasons. But to understand the limits of the appealing neighborhood-democracy idea, it is crucial to spell them out.

Our era is defined by rapid change, extraordinary mobility, and unprecedented social, ethnic, religious, cultural, and ideological heterogeneity. Spatial integration along racial lines is not what it ought to be, and integration by economic class may be deteriorating. But even on those dimensions, the many communities within our society are overlapping and intersecting.[184] Consequently, it is difficult to see how we can demarcate stable districts that are ethnically and socioeconomically homogeneous. And even where that may be possible, we cannot plausibly assume that the people within those boundaries constitute a single "community" with coherent, unified preferences.[185] Property owners, tenants, shopkeepers, senior citizens, teenagers, and the homeless have divergent interests. Who speaks for this "community"?

Other difficulties arise even if we assume that fully coherent communities exist within a city. One obstacle is interdependence; each community, however homogeneous, affects its neighbors.[186] This point remains true even

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183. If a city runs short of money—in an economic downturn, for example—will it have to lay off police officers so that it can afford to keep its serious offenders behind bars, or will it have to impose shorter sentences on its offenders, while serious offenders from affluent areas face more severe punishment? Either way, the adverse public-safety consequences for cash-strapped cities could well undermine property values, put even greater pressure on revenues, and force an additional round of cuts to policing or sentencing, in a potentially relentless downward spiral. But if a city cannot be put to these choices, the cost-sharing arrangement becomes unacceptable.

Conversely, when a city wants more policing and is willing to pay its 50 percent share, the Stuntz proposal would obligate federal and state governments to fund the rest. Affluent cities would be the first to take advantage of this opportunity, draining the available funds. And whether they do so or not, other levels of government will justifiably demand a say in how the funds they provide to localities are spent, a result exactly opposite from the decentralization that the proposal was supposed to further. To be sure, cities often need support from levels of government that have a stronger tax base, and Stuntz's analysis of this need is insightful. But the project of strengthening local control is easier said than done because it is hard to override the power of the purse—that is, to guarantee funding from the center while decentralizing operational decisions that have fiscal implications.

184. *See* Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 242.

185. *See* SKLANSKY, *supra* note 6, at 116.

186. *E.g.*, Parker, *supra* note 72, at 5 (describing interdependence of residents in large American cities in the 1950s).

with offenses that might seem quintessentially local—for example, domestic violence or street–corner drug dealing. Much of the money flowing to dealers must come, one way or another, from sources outside the poorest neighborhoods. And for both drugs and domestic violence, the impact on families concerns us all. Interdependence is an unavoidable economic and moral reality.

As a thought experiment, however, suppose that we suspend interdependence and posit the existence of homogeneous, self-contained political subdivisions. Even then, localized political control remains unworkable. Consider the fiscal dynamics. If each precinct determines its policing, charging, and sentencing practices, will each precinct also bear the fiscal costs, or can it off-load those costs onto its neighbors? The latter answer would quickly produce unsustainable spending. Economic and political principles seem to require that each self-contained precinct fund its own choices. But crime, at least street crime, is typically concentrated in the poorest neighborhoods. If each neighborhood bears only its own costs, affluent areas will remain well protected, perhaps more so than before, while poor precincts will have woefully insufficient resources. However the financially disadvantaged areas balance their criminal justice priorities, law enforcement resources will almost certainly fall short, public safety will deteriorate, and property values will decline; resources will then shrink even further, and so on, in a relentless downward spiral.

One way out of the fiscal dilemma might be for higher levels of government to provide funding, hopefully in accordance with need. This solution would leave each precinct to allocate the resulting resources as it sees fit, for example, preferring more police (with perhaps greater certainty of punishment) or longer sentences (with greater severity). Even then, anyone attentive to political incentives will see the risk that poorer districts will be shortchanged by the affluent voters who must fund them but, by hypothesis, are insulated from the public safety consequences. It may be that only the fact of interdependence protects poor neighborhoods from being shortchanged even more than they already are.

Of course, *The Collapse* does not propose any such rearrangements. Apart from wanting to draw juries from local neighborhoods in the case of strictly local crimes, it leaves political power almost precisely where it is now. Tacitly, at least, Stuntz acknowledges that law enforcement policy cannot be set, as it once was, at the neighborhood level. The upshot is that the local-democracy project, in so far as it concerns actual political power, is inherently unsustainable—from its simplest practical details to the principles at its core. And the power transfers that *are* conceivable—from judges to any of our existing political bodies—inevitably mean transfers of power to forums where the voice of the disadvantaged is even weaker than it is in the courts. As Stuntz himself apparently saw when he turned to specific remedies, vigilant judicial enforcement of important individual rights remains an essential component of successful criminal justice reform.

CONCLUSION

Bill Stuntz's parting legacy to the criminal justice community depicts with unparalleled force the appalling conditions that so much of the American public now takes for granted: discriminatory street stops, mindlessly unfair and counterproductive drug policies, grossly one-sided prosecutorial power, assembly-line conviction processes conducted behind closed doors, brutally harsh punishments, and staggering inequality in our treatment of racial minorities and the poor. Along with the eloquence and passion that infuse his writing, he offers a wealth of insight into the political pathologies that distort our funding priorities and block sensible steps toward reform. Bill's generosity, compassion for the disadvantaged, and faith in the basic decency of his fellow citizens inspired all who knew him or his work.

Beyond these powerful contributions, *The Collapse* also has an analytic agenda—to insist on attention to the economic and political incentives that affect institutional responses to abstract legal doctrine. That dimension is unquestionably important, and Bill Stuntz helped enormously in bringing it to the forefront. But *The Collapse* inadvertently illustrates the perils of the enterprise. Social, fiscal, political, economic, and organizational responses to new legal rules are terribly difficult to understand, much less foresee. And the tools and time required to do so typically lie far beyond the reach of legal scholars, not to mention judges. Should judges allow conjecture on such matters to influence their judgment about whether an asserted constitutional right should be recognized?

Traditional legal analysis does not offer complete certainty either, but it is exponentially more manageable. Our Constitution prohibits compelled self-incrimination,[187] and the central question posed in *Miranda* was simply whether the circumstances of custodial police interrogation are inherently compelling.[188] The Warren Court's affirmative answer, if not inevitable, was certainly a strong one because, as one of the *Miranda* dissenters later acknowledged, "a suspect . . . is painfully aware that he literally cannot escape a persistent custodial interrogator."[189] Yet the analytic framework advocated in *The Collapse* pushes that issue—the possibility of inherent compulsion—from sight; indeed, the book's discussion of *Miranda* does not mention the compulsion problem at all.[190] Whatever one might think about

187. U.S. CONST. amend. V.

188. *See* Miranda v. Arizona, 384 U.S. 436, 460–67 (1966).

189. Minnesota v. Murphy, 465 U.S. 420, 433 (1984) (White, J.).

190. *The Collapse* instead portrays *Miranda* as having the ambitious goal of comprehensive systemic equality. The book declares that although *Miranda* made identifying the guilty more difficult, it was "supposed to have one large compensating advantage . . . promot[ing] equality among rich and poor. . . . [It was] designed to persuade suspects that talking is foolish . . . [and its] most likely [point] is the advancement of . . . equality of result: if . . . sophisticated suspects could game the system, the poor and the unsophisticated must be given the same opportunity." Pp. 218, 223–24. This account leaves a quite inaccurate impression. Although equality concerns influenced the *Miranda* Court and surface in some of its language, the opinion's analytic framework, ideological justification, and almost all of its discussion focus on the issue of compulsion. Yet in spotlighting the equality subtext so strongly, *The Collapse* places

Miranda, *The Collapse* does not deny that it protects suspects from some compelling pressures. And that interest, though narrow, is the one that the Constitution directs courts to address.

Similar concerns apply to *Mapp*.[191] The issue was whether the Constitution requires the exclusion of evidence seized in a search that violates the Fourth Amendment.[192] The Court gave an affirmative answer, largely because it concluded that in the absence of exclusion, police would, in practice, be free to violate the Amendment with impunity. That judgment has solid support, and *The Collapse* does not suggest that the *Mapp* Court was wrong to reach it. Instead the book again drives the question of constitutional interpretation into the background, leaving the soundness of *Mapp* to turn on its political ramifications and broad systemic consequences.[193]

In the end, however, it will seldom be possible to predict how the world as a whole will differ even in the short run, much less many decades down the road, if courts decline to enforce doctrinally justified claims and leave vulnerable individuals to the political process. Summing up Stuntz's verdict on the Warren era—and probably his instinct about strong procedural rights generally—*The Collapse* stresses that "unintended consequences often swamp the intended kind" (p. 216). True enough. But, as David Sklansky has rightly warned, "[w]hat we know for certain is that without the Court's involvement we would have lost the specific protections that the Court itself provided. . . . [P]rimary effects are a good deal more predictable than secondary consequences, and they make a surer guide for statecraft."[194]

We see that point vindicated several times over in assessing the diagnosis and policy prescriptions offered in *The Collapse*. Despite the comfort and security offered even today by small, cohesive communities, their grassroots methods of governance have little bearing on the problems faced in a modern city; this reality was painfully clear even in Cleveland a century ago. And despite the lure of the low-crime, low-punishment world that America enjoyed as recently as the 1950s, that success was achieved under social circumstances that are long gone and unlikely to return. Nostalgia for those days is understandable. But we cannot bring them back by reinstating

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the compulsion problem out of view entirely; the book's discussion of *Miranda* does not even mention the word compulsion or any of its cognates.

191. Mapp v. Ohio, 367 U.S. 643, 645–46 (1961).

192. *Id.* at 658.

193. Like its treatment of *Miranda*, *The Collapse* suggests that "*Mapp* . . . [was] supposed to promote equality among rich and poor." P. 218. The book does recognize that one of the Court's goals was to enforce the Fourth Amendment more effectively, p. 224, and it asserts that a better remedy (the institutional injunction) is now available, pp. 220–21. But the book makes this a subsidiary point and does not criticize *Mapp* itself on this ground. Instead, it reasons that even though institutional injunctions were not a possibility when *Mapp* was decided, p. 221, the decision was nonetheless one of "Earl Warren's Errors," p. 216, because it accepted substantive Fourth Amendment requirements at face value and sought "simply to enforce the relevant [constitutional] rules," p. 225, without assessing their overall systemic effects.

194. David Alan Sklansky, *Killer Seatbelts and Criminal Procedure*, 119 HARV. L. REV. F. 56, 64 (2006).

the informality and localized politics that had disastrous consequences even then. The great strength of that period—low levels of crime achieved with low levels of punishment—was a consequence of distinctive socioeconomic circumstances. We cannot recapture it simply by reestablishing a particular constitutional jurisprudence.

It may be a curse of our times that the migration of power to ever-larger political units often appears economically, fiscally, and functionally imperative. In this setting, perhaps more than ever, the broader political process becomes an indispensable tool of social justice, but also a distant and capricious one. Independent courts must play an active role. And that remains especially true in the domain of procedure: "[t]he history of liberty has largely been the history of observance of procedural safeguards."[195] Notwithstanding the iconoclasm of *The Collapse*, with its insistence that James Madison and the Bill of Rights were deluded in their preoccupation with procedural safeguards (pp. 79–80), it is no accident that the European Convention on Human Rights, adopted in the wake of World War II,[196] enumerated detailed criminal procedure protections and deemed them universal, judicially enforceable human rights.

It is precisely in the domain of procedure that courts have the expertise and legitimacy to pass judgment on practices that risk unreliable adjudication and unjustified harm to individuals who cannot find protection in the political process—most obviously, criminal suspects and others whom the government targets when the political branches consider them dangerous. If we are to reverse "the collapse" of American criminal justice, we could well begin by insisting that our judiciary reclaim its indispensable role as the buffer between vulnerable individuals and the power—stronger and less bounded today than ever before—of police, prosecutors, and the passions of the political majority.

195. McNabb v. United States, 318 U.S. 332, 347 (1943).

196. Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 5, 6, 19, Nov. 4, 1950, 213 U.N.T.S. 221, 226, 228, 234.