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## Harvard professor invites readers to reflect on criminal justice system

Every person involved in the criminal justice system should be familiar with the work of professor William J. Stuntz of Harvard.

If you are not, I have some bad news and some good news. The bad news is that Stuntz died of cancer last year at the tragically young age of 52. The good news is that he left behind his magnum opus, an eye-opening analysis entitled "The Collapse of American Criminal Justice" (Harvard, 2011). If you wish to be part of the coming decade's dialogue concerning the nation's criminal justice system, you have to read this book.

For openers, one of the reasons Stuntz is so provocative is that, unlike most scholars in the area, he simply cannot be pigeon-holed as either "pro-prosecution" or "pro-defense." Stuntz's work transcends these categories. On the one hand, he was a registered Republican, he passionately argued for more prosecutors and police and he could be withering in his criticism of the Warren Court. Yet he was also unstinting in his condemnation of current American imprisonment rates, especially among blacks and Latinos.

Stuntz's genius lay in his ability to see the big picture and to focus on the system as a whole. He was a master at identifying the unintended consequences of well-meaning reforms. I would describe his vision of the American criminal justice system as based on principles of hydraulics: You can dam up the flow of water successfully at one point, but rest assured the water will find another place to flow. Change must be organic, not localized.

His book is so rich that it cannot be reduced to one short column. But I will give you one example that epitomizes his way of thinking.

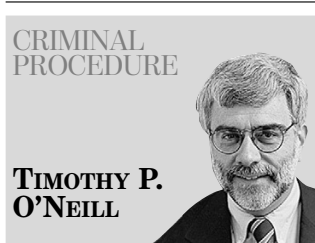
Stuntz argues that a century ago, urban communities within a county vastly predominated over suburban communities. Thus, the urban voters — mostly ethnic im-

migrants — had power to select the county prosecutor, who was more likely to reflect their views on which laws should be enforced. In addition, urban dwellers could also make their influence felt in the jury box. Crimes were more vaguely defined — e.g., acting with a "vicious will" or a "guilty mind." Thus, juries could engage in lenity or even nullification. Stuntz notes that nearly half of the prosecutions of serious crimes involved jury trials. Therefore, ethnic immigrants judged the culpability of ethnic immigrants like themselves.

The result? Juries in the early 20th century engaged in "moral evaluation, not just fact-finding. Jurors were free to acquit whenever criminal punishment seemed, on balance, unfair. Acquit they did, and frequently." (30) Stuntz notes that in Chicago at that time, about 75 percent of homicides led to no criminal punishment, "not because the perpetrator could not be identified, but because no jury would convict." (30) The musical "Chicago" was not that far from the real Chicago. It was not a world of perfect justice, but the community was able to bring its values into the courthouse and jury room.

What changed? Fifty years ago the Warren Court, with the best of intentions, selectively incorporated the procedural protections of the Bill of Rights against the states. From a defense attorney's viewpoint, it created an incentive to spend increasing amounts of time and resources on motions to suppress evidence based on illegal searches and seizures and involuntary confessions. Consequently, judges and lawyers began spending less time on issues of guilt and innocence. For example, a 1980s study on court-appointed defense lawyers showed these lawyers visited the crime scene in only 12 percent of homicide cases and 4 percent of other felonies. (228) In Stuntz's words, this resulted in an increase in "motions practice, not factual investigation." (228)

Police and prosecutors from the executive branch loudly com-



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plained about these alleged pro-defense decisions from the judicial branch. The result was the legislative branch got involved. The legislature "got tough on crime" by creating dozens of new criminal laws with draconian sentences. A large number of these new offenses criminalized the possession of drugs and weapons.

Why drugs and weapons? So much of American law depends upon the testimony of live witnesses and, Stuntz notes, "violent street gangs in the United States do an effective job of intimidating

witnesses" in the neighborhood. (79) But crimes of drug and weapons possession require only one witness: a police officer. Much like the use of income tax evasion against Al Capone, the drug and weapons violations are used as proxies for the violent felonies prosecutors cannot prove.

So the legislatures give police more tools to arrest the people they wish to arrest. Prosecutors — increasingly beholden to their suburban voters — can then pile felony charges onto minority defendants in high-crime urban areas. The possibility of decades-long sentences encourages plea-bargaining. Any trial — much less a jury trial — becomes more of a rarity. And we are left with approximately 95 percent of felonies resulting in pleas, thus eliminating the local control citizens once exercised through the jury box. (32)

And these convicted felons have to go somewhere after sentencing. So between 1972 and 2000, the nation's imprisonment rate increased by about 500 percent. As Stuntz expresses it, "In the span of a little more than three decades, Americans first embraced punishment levels lower than Sweden's, then built a justice system more punitive than Russia's." (34)

Stuntz does offer some remedies. Hiring more police has been shown to actually reduce the number of crimes committed. More lawyers would result in fewer pleas and more reliable outcomes. He advocates a reduction in both the severity and the racial disparity in sentencing. He also suggests that if local governments had to shoulder more of the cost of prison and less of a share of the cost of police, it would create better incentives in both areas.

John Stuart Mill encouraged his liberal friends to read the conservative Samuel Taylor Coleridge because his genius would force liberals to refine their arguments and avoid complacency. The remarkable thing is that Stuntz's work has that effect, in different ways, on both liberals and conservatives.

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