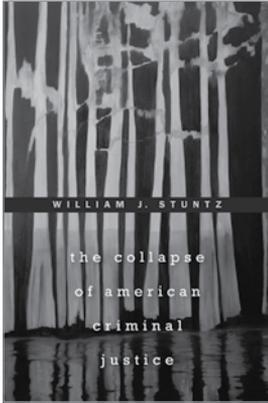


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BOOK REVIEW

The Collapse of American Criminal Justice by William J Stuntz



THE COLLAPSE OF
AMERICAN CRIMINAL
JUSTICE,
by William J Stuntz
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Consider the opening passage of this book: “[t]he last half of the twentieth century saw [the] criminal justice system unravel. This book seeks to address two questions. First, how did the unravelling happen? And second, how might our dysfunctional justice system be repaired? Answering the first question gives some distance towards answering the second ... for black males. Signs of the unravelling are everywhere. The nation’s record-shattering prison population has grown out of control ... a term in the nearest penitentiary has become an ordinary life experience, a horrifying truth that wasn’t true a mere generation ago. Ordinary life experiences are poor deterrents, one reason why massive levels of criminal punishment coexist with historical high levels of urban violence.”

On the basis of this passage, it might be thought that this book engages with South Africa’s ‘crime problem’! It is, however, a work which deals exclusively with the American criminal justice system. Professor Stuntz has produced a compelling argument to suggest that “the (US) criminal justice system has run off the rails”. As he notes, between 1972 and 2000 the nation’s imprisonment rate quintupled. The number of prison-years for murder multiplied nine times. Prisons that held two hundred thousand inmates in 1968 held more than 1.5 million prisoners by 2008, while local jails imprisoned a further eight hundred thousand.

Stuntz offers two explanations for these stark and depressing developments. The one is based on democracy, the other on law. Stuntz is concerned that local institutions, particularly city police forces and county prosecutors’ offices, which did most of the enforcing of the law, have lost their power. As populations have shifted to the city, political power moved towards the metropolitan centres, so that local populations have far less influence over the process of the criminal justice system and its implementation. Furthermore, he contends that jury trials have become rare events. More than 95% of all criminal convictions are now the result of plea bargains. Consequently, power has shifted from the local citizens who sit on juries, to assistant district attorneys who decide whom to punish and the severity thereof.

With regard to the law, Stuntz argues that a considerable amount of discretion is now exercised by the police, as a result of which discretionary power is exercised differently in poor city neighbourhoods compared to wealthier urban and suburban communities. Thus, the law no longer guarantees equality of criminal enforcement.

This book raises a further interesting and provocative argument about the effect of constitutional law upon criminal justice. In particular, attention is drawn to the

landmark decisions issued by the Supreme Court between 1961 and 1969 (the ‘Warren Court’) which adopted a due process model of criminal justice, thereby making criminal law enforcement and litigation more expensive, as constitutional rights and the protections thereof were extended considerably to defendants. In Stuntz’s view, this focus invited a political backlash from conservative politicians like Ronald Reagan, which in turn caused law enforcement practices to toughen.

Furthermore, key decisions like that in *Miranda v Arizona* (1968) gave suspects a right to the assistance of counsel during police questioning and further entrenched the right of an accused to remain silent. As we have all learnt from TV series, an accused must be warned that anything said may be used against him/her in a court of law, that the accused will have a right to the presence of an attorney and if he/she cannot afford an attorney, one will be appointed before any police questioning may take place. Once a defence counsel is appointed, his or her sole task is to ensure that police questioning will be prevented, so that no incriminating statement may be procured from the client. Charges are then reduced, or a more favourable sentence is imposed, or some other form of plea bargaining is arranged. Sophisticated criminals, chiefly recidivists and white collar defendants, employ the *Miranda* advantages, which in turn increases the gap between the wealthy, who can employ competent counsel, and the poor, who are unable to. This analysis is extremely relevant to South African constitutional law, which seeks to achieve the correct balance between due process and crime control.

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These consequences are central to Stuntz’s argument. In his view, punishment will not control crime at an acceptable cost when it is imposed in so discriminatory a fashion. Without the influence of local democracy that was once central to the criminal justice system, community policing is unable to respond to the wishes of those who live daily with the direct consequences of high crime rates. In this way, the criminal justice system is unable to curb the scourge of crime, or prevent the disastrous consequences of policies pursued over the past fifty years.

Both of these warnings have significant implications for South Africa and the disturbing levels of crime now experienced in this country. According to SAPS 2012 crime figures, in 2010 – 2011 the reported murder rates (although lower than the actual murder rate) are 31.9 per hundred thousand of the population. Sexual offences are 132.4 per hundred thousand of the population. Although these figures declined from the previous two years, they still reveal extraordinarily high levels of violent crime. It is unsurprising that, for the similar period, our prisons, which have the capacity of to house 118 154 prisoners, at 31 March 2011 housed a total of 160 545 prisoners.

What is disappointing about this book, when viewed from a South African perspective, is the unconvincing and somewhat equivocal treatment of the various explanations for the reduction of crime in the United States over the past 20 years. Although Stuntz notes that crime rates have levelled off after 2000, between 1991 and 2000 the murder rate per hundred thousand populations in Atlanta dropped by 38%; in Boston by 65%, in New York by 70% and in Los Angeles by 49%. Stuntz lists the causes of this significant reduction as destruction of the crack boom in the last half of the 1980’s, the growing economy of the 1990’s which provided would- be criminals with better options for earning a living, tougher gun laws which made gun

crimes more costly, weaker gun laws which made it easier for potential crime victims to protect themselves against predatory crime, changes in the abortion rate in the 1970's which led to fewer young men being available to commit crime in the 1990's, a rise of community policing which led to more effective police work and which, in turn, produced lower crime rates, as well as an expansion of urban police forces, which increased the police presence in high crime neighbourhoods and reduced rates there. (page 277)

Furthermore, Stuntz refers to the effect of the exponential increase in the prison population, which reduced crime by imprisoning 'hard core' offenders, and deterred others who wished to avoid long term imprisonment. All of these explanations receive cogent mention, but there is little by way of a clear explanation, apart from the 'laundry list', as to what caused the massive decline in the levels of serious crime. This is unfortunate, as the South African reader is desperate to understand the reasons for this decline in order to explore possible solutions to the cancer of crime that has riddled this country.

By contrast, there is a far more helpful and insightful description of the effect of the criminal justice system on society. As Stuntz writes:

“Today we understand punishment’s necessity but have forgotten its destructive power. Americans need to remember both halves of the formula and to build a justice system founded on the tension between them ... The criminals who are incarcerated are not some alien enemy. Nor, for that matter are the police officers and prosecutors who seek to fight crime in those criminals’ neighbourhoods. Neither side of this divide is ‘them’. Both sides are us. Democracy and justice alike are dependent on getting that most basic principle of human relations right.” (page 307 – 308)

This is a powerful reminder to all participants in the criminal justice debate in South Africa. Recent debates about the police force in general and the role of police like Richard Mdluli must surely focus our attention on the need to have honest police, accountable to the law, who respond to the pressing needs of local communities where violent crime frequently takes place. The legal system must provide sensible legal principles, as well as personnel capable of delivering criminal justice based on the principles of equal protection for all.

Anyone who has conducted an investigation of the violent crimes which take place daily in South Africa will know that democracy and the building of local communities is essential if the rule of law is to be consolidated, discrimination abolished and criminal punishment enforced. Viewed accordingly, this disturbing analysis of the American criminal justice system should be compulsory reading for all who are concerned with our local crime problem.