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# Rebuilding Justice: A Review of the Collapse of American Criminal Justice, by William J. Stuntz

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Rebuilding Justice: A Review of The Collapse of American Criminal Justice, by William J. Stuntz

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America’s criminal justice system has led to extremely high incarceration rates and high crime rates in many poor and working-class neighborhoods. William Stuntz’s final book, *The Collapse of American Criminal Justice* suggests ways to improve America’s system of criminal justice. My review compares Stuntz’s view of American criminal justice with the views of empirical social scientists Mark Kleiman and David Kennedy, whose work is used around the country in successful social experiments to reduce crime. Stuntz believed that changes in law and society have delegated too much power to prosecutors and not enough to judges, juries, and average citizens, and reforms in America’s criminal justice system need to focus on rebuilding the rule of law and local democracy. In contrast, Kennedy and Kleiman believe that criminal justice reforms should focus on increasing the swiftness and certainty of punishment. Kennedy’s and Kleiman’s ideas have been used to combat gang violence, clean up open-air drug sales, and increase the effectiveness of probation for drug-using probationers. Overall, *The Collapse of American Criminal Justice* is a well-written and insightful important book, but a comparison with the empirical work of Kennedy and Kleiman strongly suggests that some of Stuntz’s recommendations to improve American criminal justice are impractical or unwise, and that reforms in policing and probation are likely to be more successful than Stuntz’s proposed changes to criminal law and procedure.

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I. Introduction

Our criminal justice system is troubled. At current incarceration rates, one-third of all black men will be incarcerated in their lifetimes.<sup>1</sup> In fact, black incarceration is 80% higher than the rate at which Stalin’s regime banished his subjects to the Gulag.<sup>2</sup>

Hyper-incarceration of black men has not led to safe neighborhoods; the neighborhoods from which incarcerated black men come are often extremely dangerous. Statistics are

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<sup>1</sup> BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 (2003), available at <http://www.prisonpolicy.org/graphs/lifetimechance.html>.

<sup>2</sup> ANNE APPLEBAUM, GULAG; A HISTORY 579 (2003).

insufficient to describe them; David Kennedy vividly describes his impressions of drug-infested neighborhoods in his 2011 book, *Don't Shoot*:

I've never been so scared in my life, before or since...young men selling drugs...the child lookouts and runners; the burnt, leathery crack monsters, many of them women, hollowed out by the pipe; old men fawning over young men for a dollar or a rock; dirt and trash and empty bottles; the cold thug bravado of the groups of young men. Older women...locked in their apartments, afraid to go outside, afraid of stray gunshots, afraid for their children and grandchildren, afraid of their children and grandchildren...I had an absolutely visceral response...It was *this is not okay. People should not have to live like this. This is wrong.*<sup>3</sup>

The combination of extremely high incarceration rates and extremely high crime rates in many (often predominately African-American) neighborhoods calls for major changes in our system of criminal justice.

William J. Stuntz's offers proposals to fix America's justice system in his final book, *The Collapse of American Criminal Justice*, which was published posthumously after his death from cancer in March of 2011. Stuntz was a longtime professor at Harvard Law School and one of America's leading criminal law and criminal procedure professors. *The Collapse* is a popular history of America's criminal justice system from the point of view of a criminal law and procedure professor. It serves as a capstone to Stuntz's academic career. Stuntz tries to explain three things: (1) why we have the highest incarceration rate in the world, (2) why mass incarceration has had little effect on crime, and (3) and how our criminal justice system might be fixed.

This review will compare Stuntz's view of America's criminal justice system to that of social experiments conducted and/or described by David Kennedy and Mark Kleiman. Kennedy

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<sup>3</sup> DAVID KENNEDY, DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE ON INNER-CITY AMERICA 4, 6 (2011).

and Kleiman were chosen as a comparison because successful social experiments described or inspired by these authors have been conducted around the country, reducing both crime and incarceration.<sup>4</sup> While Stuntz wants reforms that would move us towards the justice system that existed outside of the South until the middle of the 20th Century, Kennedy and Kleiman favor new methods of crime prevention and punishment, with a community-oriented focus. The successes of these approaches in cities across America militate against Stuntz's advocacy for a restoration of the legal system of a half century ago, which included more jury trials, juries more representative of high-crime neighborhoods, and criminal law that was more favorable to defendants. *The Collapse* is an important book that explains how our criminal justice system has failed over the last fifty years, and how our criminal justice system used to be fairer, more efficient, and more effective (at least outside the South).

Part II of this review summarizes Stuntz's view of American criminal justice. Part III summarizes Kennedy and Kleiman's view of our criminal justice system. Part IV uses Stuntz's policy recommendations to compare the views of Stuntz to those of Kennedy and Kleiman. Part V concludes by evaluating the ideal criminal justice systems of Stuntz and of Kennedy and Kleiman.

## II. Stuntz's View of American Criminal Justice

### a. Stuntz's Vision

*The Collapse's* thesis is that the American criminal justice system has collapsed because changes in law and society have eroded both the rule of law and the democratic constraints

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<sup>4</sup> *E.g.* KENNEDY, *supra* note 1; DAVID KENNEDY, *DETERRENCE AND CRIME PREVENTION: RECONSIDERING THE PROSPECT OF SANCTION* (2009); MARK KLEIMAN, *WHEN BRUTE FORCE FAILS* (2009).

that once gave most of America a well-functioning criminal justice system.<sup>5</sup> Changes in substantive criminal law have delegated too much power to prosecutors and not enough to judges, juries, and average citizens.<sup>6</sup> With this discretion, there is neither control of discrimination nor proportionality.<sup>7</sup> Power to control criminal law and crime has moved away from those most affected by it.<sup>8</sup> Therefore, criminal law has lost the stability that local accountability once gave it.<sup>9</sup> Stuntz's suggestions on how to rebuild America's criminal justice system focus on rebuilding the rule of law and local democracy.

Stuntz succinctly states his vision for American criminal justice:

"Make criminal justice more locally democratic, and justice will be more moderate, more egalitarian, and more effective at controlling crime. Law can advance that cause, and once did so. Criminal law...once seemed designed to ensure that those defendants who suffer punishment deserve it in the view of their neighbors and peers. Today, American criminal law is designed to facilitate criminal convictions and to make plea bargaining easier for prosecutors. Before the last half-century, the law of trial procedure made jury trials cheap and reasonably effective, and therefore common. Today's elaborate body of procedural rules has made trials expensive, rare, and error prone. A return to the older models of legal doctrine, both substantive and procedural, would at least reduce...injustice...and might also do a better job of controlling crime."<sup>10</sup>

In support for his sweeping claims, Stuntz observes that: (1) with 2.3 million people incarcerated, we have the harshest criminal justice system in the history of democratic government,<sup>11</sup> (2) there is widespread discrimination against Black men (at current rates, the Black incarceration rate is about twice that of imprisonment rates in Russia during Stalin's

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<sup>5</sup> WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 6 (2011).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 9.

<sup>10</sup> *Id.* at 39.

<sup>11</sup> *Id.* at 5.

reign),<sup>12</sup> (3) official discretion rather than legal doctrine or jury judgment define criminal justice outcomes (over 95% of all convictions are plea bargains),<sup>13</sup> and (4) crime rates, while below the level in the 1980s and early 1990s, are still higher than in the 1950s.<sup>14</sup> The American criminal justice system is neither fair, nor efficient, nor effective.

Stuntz believes that people commit crime in large part because they no longer believe the system of law enforcement is fair and worthy of their respect.<sup>15</sup> To Stuntz, this loss of legitimacy has occurred because those most affected by the American criminal justice system, African-Americans, have little power over it.<sup>16</sup> This is in stark contrast to the experience of immigrants in the seventy years before World War I, who came to control the criminal justice system in the areas in which they lived.<sup>17</sup> In Stuntz's view, returning to the criminal justice system that reigned in the North a century ago would give the system legitimacy that it now lacks.

#### b. "Two Migrations"

Stuntz buttresses his conclusions about the American criminal justice system by comparing the criminal justice outcomes of "two migrations": mass European immigration to the United States in the seventy years before World War I and the migration of African-Americans from the South to the North from 1900-1970. Both sets of migrants went to the same cities. However, the effects of these two migrations on crime were very different.

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<sup>12</sup> *Id.* at 48.

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.* at 9.

<sup>15</sup> *Id.* at 29.

<sup>16</sup> *Id.* at 29-30.

<sup>17</sup> *Id.*

European immigration had little effect on crime, while crime and especially homicide rates skyrocketed in cities with large populations of African-Americans in 1980.<sup>18</sup> The actual homicide rates are shocking; while the current national yearly homicide rate is about 5 per 100,000 residents, the homicide rate in Cleveland and Detroit was 46 per 100,000 in 1980.<sup>19</sup>

According to Stuntz, “[t]oday’s justice system does punish crime more severely than in the past—but its defining feature is that it punishes vastly more often.”<sup>20</sup> Neither the increase in drug crimes nor the average sentence of incarceration can explain the increase in American incarceration rates since 1973. Even though the rate of imprisonment for drug offenses in the United States has risen tenfold over the last thirty years, drug prisoners only account for twenty percent of the overall prison population.<sup>21</sup> Furthermore, the average time served for state-court felony convictions has risen from 28 months to 34 months, which is significant, but not enough to explain the rise of mass incarceration.<sup>22</sup>

Stuntz then examines the three major theories behind the rise and later fall of crime rates in 20<sup>th</sup> century America: (1) economic, (2) changes in punishment levels, and (3) legitimacy.<sup>23</sup> Out of these three theories, Stuntz finds legitimacy most important and finds economic and punishment theories of changes in crime rates wanting.

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<sup>18</sup> *Id.* at 17-19, note that Homicide rates from 1840-1925 are from ERIC H. MONKONEN, MURDER IN NEW YORK CITY 9 (2001); city homicide rates from 1950-1980 are taken from the FBI’S UNIFORM CRIME REPORTS (various years), and the Black percentage is taken from CAMPBELL GIBSON AND KAY JUNG, U.S. CENSUS BUREAU, HISTORICAL CENSUS STATISTICS ON POPULATION TOTALS BY RACE, 1790 TO 1990, FOR LARGE CITIES AND OTHER URBAN AREAS IN THE UNITED STATES (2005).

<sup>19</sup> *Id.* at 19.

<sup>20</sup> *Id.* at 47.

<sup>21</sup> *Id.* (citing data from BUREAU OF JUSTICE STATISTICS ONLINE SOURCEBOOK (various years)).

<sup>22</sup> *Id.* (citing data from MARGARET WERNER CAHALAN, BUREAU OF JUSTICE STATISTICS, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984 52 (1986); SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 511 (2003))

<sup>23</sup> *Id.* at 26-29.

Economic conditions cannot explain changes in crime rates because crime rates aren't correlated with the business cycle.<sup>24</sup> Even if we note that pre-WWI immigrants performed better in the labor market than today's African-Americans, this is not a satisfactory explanation because even as the labor market has continued to deteriorate for Black men, crime has not increased.<sup>25</sup>

Stuntz notes that changes in punishment levels also do not fully explain changing crime levels. Punishment per crime fell sharply in the 1950s and 1960s while crime rose sharply, and imprisonment rates rose in the 1990s when crime fell.<sup>26</sup> However, imprisonment rates skyrocketed in the 1970s and 1980s, and crime continued to rise.<sup>27</sup> So, changes in punishment do not clearly explain changes in crime.

In *The Collapse*, Stuntz posits that legitimacy may be the best explanation for changes in crime over time.<sup>28</sup> Pre-WWI Immigrants and the children of those immigrants mostly controlled the justice system that governed them.<sup>29</sup> Immigrants also exercised power by serving on juries; almost half of all serious criminal cases went to juries, and juries often acquitted.<sup>30</sup> Incarceration rates were low.<sup>31</sup> In contrast, African-Americans have no such power; most live in

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 26-27. According to BORJAS ET AL, IMMIGRATION AND AFRICAN-AMERICAN EMPLOYMENT OPPORTUNITIES: THE RESPONSE OF WAGES, EMPLOYMENT, AND INCARCERATION TO LABOR SUPPLY SHOCKS 2 (2007, NBER Working Paper 12518), the employment rate (representing average weeks worked) for Black men fell from 75% in 1960 to 68% in 2000. For Black high-school dropouts, the employment rate fell from 72% in 1960 to 42% in 2000.

<sup>26</sup> *Id.* at 28.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 29.

<sup>29</sup> *Id.* at 29-30.

<sup>30</sup> *Id.* at 30.

<sup>31</sup> *Id.*

counties dominated by whites, and very few cases (less than 5% of all convictions) are handled by juries.<sup>32</sup>

Legitimacy is both hard to measure and hard to define. Stuntz states that “the justice system of the Gilded Age relied heavily on soft power and social capital to deter crime,” and defines soft power as “local democracy and the network of relationships that supported it.”<sup>33</sup> Stuntz contrasts this with the “hard power” used today to control crime, mostly in the form of incarceration.<sup>34</sup> In Stuntz’s view, legitimacy is enhanced when those in neighborhoods most affected by crime control the criminal justice system.

### c. Criminal Law and Local Democracy

Criminal law used to be a mostly local enterprise. Criminal defendants were arrested by local police, who referred cases to locally-elected prosecutors, who sent cases to trial under locally-elected judges with local juries.<sup>35</sup> State criminal law was flexible, so much so that crimes and sentences were effectively determined by those locally-elected judges and local juries.<sup>36</sup> Those who were most affected by crime controlled the criminal justice system. Therefore, the criminal justice system was both controlled by and responsive to local democracy.

Criminal law is no longer controlled by local actors. Federal law has grown exponentially, taking partial control of behavior that used to be controlled exclusively under

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<sup>32</sup> *Id.* at 32 (citing BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS [online], Table 5.57 (2006))

<sup>33</sup> *Id.* at 31.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 64-65.

<sup>36</sup> *Id.* at 83-84.

state law.<sup>37</sup> Many state and federal criminal laws have mandatory minimum sentences.<sup>38</sup> State and federal laws provide less room for interpretation, often imposing strict liability for behavior that used to be governed by a requirement that the defendant have criminal intent to commit the crime to be prosecuted (*mens rea*).<sup>39</sup>

Prosecutors and judges are often county-level elected officials, and are therefore often elected by mostly-white electorates, rather than by the mostly-black neighborhoods who are most affected by the criminal justice system. Furthermore, juries are usually selected from a county-wide juror pool. According to Stuntz, this lack of local democracy for the neighborhoods most affected by crime has led to extremes of instability in the criminal justice system, starting with excessive lenity in the 1950s and 1960s, and now excessive severity since the 1980s. Stuntz believes that those most affected by crime need to have more control over criminal justice for the criminal justice system to remain stable and effective.

#### d. How Changes in Substantive Criminal Law Have Undermined Procedural Protections

According to Stuntz, criminal law in the United States has few substantive but many procedural protections for defendants.<sup>40</sup> The procedural protections that exist are largely derived from the U.S. Constitution, and come from the Fourth Amendment (“unreasonable searches and seizures”), Fifth Amendment (no double jeopardy or compelled self-

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<sup>37</sup> *Id.* at 305.

<sup>38</sup> *Id.* at 32.

<sup>39</sup> *Id.*

<sup>40</sup> See e.g. U.S. CONST. amend. I; *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parents could not be forced to send their children to public schools); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to contraception); and *Roe v. Wade*, 410 U.S. 113 (1973) (right to a first-term abortion)

incrimination), Sixth Amendment (right to speedy and public jury trial, assistance of counsel, and right to have defense witnesses and cross-examine government witnesses) and Eighth Amendment (no “excessive fines” or “cruel and unusual punishment”). The Fourteenth Amendment applies these amendments to state action. In spite of all of those procedural protections, the incarceration rate has skyrocketed since the 1970s.<sup>41</sup>

Stuntz reasons that procedural protections have helped lead to more incarceration and that “Madison’s iconic legal rights...were inconsequential before the mid-twentieth century, and have been mostly perverse since.”<sup>42</sup> To justify this strong statement, Stuntz argues that the Bill of Rights preceded criminal justice’s institutions and was designed to prevent abuses like those colonists suffered from England.<sup>43</sup> State and federal legislatures have evaded procedural protections for defendants by changes in substantive law.

Criminal law used to have stronger substantive protections in that convictions required criminal intent (*mens rea* or “guilty mind”).<sup>44</sup> This allowed judges and juries to acquit defendants who in their opinion did not intend to commit a harmful act.<sup>45</sup> In the Gilded Age and before, many defendants were acquitted of serious crimes, including homicides, if juries did not feel the defendant was blameworthy.<sup>46</sup>

Legislative changes to criminal law in the Gilded Age tended to respect the notion of criminal intent, and were therefore much less stringent than criminal law today. For example,

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<sup>41</sup> STUNTZ, *supra* note 37, at 33 (citing data from BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS [online], Table 6.29 (2008)).

<sup>42</sup> *Id.* at 68.

<sup>43</sup> *Id.* at 70-73.

<sup>44</sup> *Id.* at 32.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 136-37.

(alcohol) Prohibition did not prohibit the use or possession of alcohol. The Eighteenth Amendment only prohibited the manufacture, sales, transportation, importation, and exportation of alcoholic beverages. This made Prohibition, and the Volstead Act which enforced it, much less stringent than current drug prohibitions.

Modern criminal law has greatly weakened *mens rea* standards. In Stuntz's recounting, this weakening was done to evade increased procedural protections.<sup>47</sup> Legislators redefined intent terms so that the proof was automatic and created overlapping crimes that vary slightly from one another so that more than one can be charged from a single incident.<sup>48</sup> Legislators also used drug charges and greatly increased sentences for drug and other crimes to allow prosecutors to induce guilty pleas without worrying about trials or *mens rea*.<sup>49</sup>

Stuntz argues we should rebuild our criminal justice system by returning to a system with fewer procedural protections and more stringent substantive law protections for defendants. He believes this would likely lead to more jury trials and therefore limits on prosecutorial discretion. To Stuntz, while most of substantive law is timeless, criminal procedure depends on pragmatic judgments and adaptation to changing conditions.<sup>50</sup> 60% of state prisoners are incarcerated for what Stuntz calls "universal" crimes (murder, manslaughter, rape, assault, robbery, burglary, larceny, auto theft, and fraud).<sup>51</sup> In contrast, criminal

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<sup>47</sup> *Id.* at 81-83.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 79.

<sup>51</sup> *Id.*

procedure is very different in an adversarial system like ours than in inquisitorial systems like those of civil law countries like France, Germany, and Sweden.<sup>52</sup>

In Stuntz's view, it is easier for substantive law to erode procedural protections than for procedural law to erode substantive protections.<sup>53</sup> For Stuntz, this is central to his ideal vision of criminal justice. He suggests a few basic procedural rules: no coerced confessions, high burden of proof for conviction, right to counsel for defendants with a right to hire investigators and forensic experts, and an impartial judge (and jury if possible).<sup>54</sup> In contrast, substantive law protections would include both the reinstatement of *mens rea*, possibly along with more substantive protections coming from cases like *Lambert v. California* (1957) (ban on surprising criminal liability),<sup>55</sup> *Robinson v. California* (1962) (limits on criminal liability for drug purchase or drug possession),<sup>56</sup> and *Griswold v. Connecticut* (1965)<sup>57</sup> (right to privacy barring criminal punishment for private behavior that causes no direct injury to anyone else).<sup>58</sup> If substantive due process had evolved in this fashion, it would have drastically changed the nature of American criminal law; for example, had *Griswold v. Connecticut* been read as allowing private behavior that doesn't harm anyone else, it probably would have legalized prostitution that took place in personal homes, rather than on the street or in brothels.

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 80.

<sup>54</sup> *Id.* at 81.

<sup>55</sup> *Lambert v. California*, 355 U.S. 225 (1957) (invalidated a city ordinance that required felons entering a particular town to register with the town police).

<sup>56</sup> *Robinson v. California*, 370 U.S. 660 (1962) (invalidated a law that outlawed drug addiction).

<sup>57</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965)

<sup>58</sup> STUNTZ, *supra* note 52, at 210.

*The Collapse* demonstrates how far American criminal justice has departed from its common law origins. Most of this departure took place in the last half of the 20<sup>th</sup> century.<sup>59</sup> Nowadays, criminal law codes now resemble civil codes, and are interpreted strictly without the application of *mens rea* assumed in earlier versions of American criminal codes. The effects of this departure have been profound—and profoundly negative—for poor, African-American men who are incarcerated at shockingly high rates. America’s common law criminal justice system worked fairly well for hundreds of years, and was then abandoned for the mixed system we have today. That was unwise.

### III. Kennedy’s and Kleiman’s Views of American Criminal Justice

David Kennedy and Mark Kleiman, in their recent books, describe a very different approach to criminal justice reform than that of Stuntz.<sup>60</sup> Some of this is due to the fact that both Kennedy and Kleiman are public policy experts rather than criminal law and procedure professors. Differences in discipline notwithstanding, Kennedy’s and Kleiman’s approaches are drastically different than Stuntz’s, with Stuntz focusing on changes in criminal law and procedure, and Kennedy and Kleiman focusing on administrative changes in policing, parole, and probation.

#### a. How Criminals Think

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<sup>59</sup> *Id.* at 261. For an example of *mens rea* used to function in American criminal law, see e.g. *United States v. Morrissette*, 342 U.S. 246 (1952).

<sup>60</sup> KENNEDY (2009), *supra* note 2; KLEIMAN (2009), *supra* note 2; KENNEDY (2011), *supra* note 1.

Kennedy's and Kleiman's social experiments are supported by both theory and experience. The theory is based on behavioral economics, which adjusts standard economic models to account for psychological insights.

When legislators and administrators want to reduce crime, they can work to increase the severity of punishment, the swiftness of punishment, and/or the certainty of punishment. In recent years, America has increased both the severity of punishment and the number of arrests.<sup>61</sup> These approaches have been unsuccessful and have led to massive increases in incarceration without commensurate decreases in crime.

Standard economic models assume that people are fully rational and commit crimes when the utility of committing a crime is more than the utility of not committing a crime.<sup>62</sup> A fully rational criminal would have a utility function like:

$$E(U) = (1-p) \cdot U(y) + p \cdot U(y-F)$$

where  $E(U)$  is the actor's expected utility from an illegal act,  $p$  is the likelihood of being punished,  $y$  is the anticipated returns (material or psychic) from the illegal act, and  $F$  is the expected penalty of the actor is punished. Furthermore, people value utility over time at:

$F_R(0) = 1$  and  $F_R(T) = D^T$  where  $D$  is a constant between 0 and 1,  $T$  is the amount of time that has passed, and  $F$  determines fraction of utility at time 0 valued at time  $T$ .

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<sup>61</sup> Stuntz, *supra* note 3 at 47.

<sup>62</sup> See e.g. Gary Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT*, 1-54 (Gary Becker and William Landes eds., 1974). Retrieved at <http://www.nber.org/chapters/c3625.pdf>.

Assuming full rationality, government can affect the number of illegal acts by changing the penalty, the swiftness of punishment, and the probability of capture. If criminals are fully rational, then it is more economical for governments to increase penalties rather than swiftness of punishment or probability of detection. This is because if the penalty is high enough, the expected value of the illegal act will be negative and no one will commit crime and require adjudication or incarceration. Even if we assume that there is a limit to how high a penalty can be made, it is likely that penalties could be made high enough to deter fully rational actors from committing crimes.

State and federal legislatures have in fact greatly increased sentences for crimes, especially drug crimes. As an example, in Connecticut, the sale of more than one ounce of heroin or more than one-half ounce of cocaine has a five-to-twenty year sentence for a first offense.<sup>63</sup> The assumption that criminals are fully rational fails miserably in practice; increasing both arrests and the severity of punishment has resulted in skyrocketing imprisonment rates without commensurate decreases in crime. These failures strongly imply that the American criminal justice system needs to find a better way to think about deterrence.

In contrast to the standard economic model, behavioral economics assumes that people (especially criminals) are partly rational. In this model, people still maximize utility, but their utility functions over time are approximated by a quasi-hyperbolic function:<sup>64</sup>

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<sup>63</sup> CONN. GEN. STAT. § 21a-278 (2011). (applies to those who are not “drug-dependent”).

<sup>64</sup> David Laibson. *Golden Eggs and Hyperbolic Discounting*, 112 QUARTERLY JOURNAL OF ECONOMICS 443 (1997).

$F_{QH}(0) = 1$  and  $F_{QH}(T) = B * D^T$  where both B and D are constants between 0 and 1, and T is the amount of time that has passed, and F determines fraction of utility at time 0 valued at time T.

To the extent that B is significantly less than 1, that means that the swiftness of punishments matters greatly.<sup>65</sup> A punishment delivered in a year after a lengthy trial will have much less deterrent value than a smaller punishment delivered today or tomorrow. Furthermore, if D (the discount rate) is significantly less than 1, then severe punishments will have little or no deterrent value.

In fact, most empirical studies have found that the severity of sanctions does not affect deterrence.<sup>66</sup> This could be true for several reasons. The public's very inaccurate understanding of criminal sanctions strongly suggests that increases in sanctions will likely have no effect on deterrence. This contradicts another assumption of the standard economic model, which is that all actors have full information. Also, surveys of criminals suggest that criminals value the present much more than the future.<sup>67</sup> Therefore, increases in the severity of punishment have relatively little potential to increase deterrence, and swiftness and certainty

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<sup>65</sup> See e.g. C.A. Simpson and R.E. Vuchinich, *Hyperbolic Temporal Discounting in Social Drinkers and Problem Drinkers*, 6 EXPERIMENTAL AND CLINICAL PSYCHOPHARMACOLOGY 292 (1998) (addicts, which include a lot of criminals, have significant self-control problems).

<sup>66</sup> See e.g. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE (1967); THE NATIONAL ACADEMY OF SCIENCES PANEL ON RESEARCH ON DETERRENCE AND INCAPACITATIVE EFFECTS (1978); NATIONAL ACADEMY OF SCIENCES PANEL ON THE UNDERSTANDING AND CONTROL OF VIOLENT BEHAVIOR (1993); Anthony N. Doob and Cheryl Marie Webster *Sentence Severity and Crime: Accepting the Null Hypothesis*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH 143 (Michael Tonry ed. 2003)

<sup>67</sup> See Kent A. McClelland and Geoffrey A. Alpert, *Factor Analysis Applied to Magnitude Estimates of Punishment Seriousness: Patterns of Individual Differences*, 1 JOURNAL OF QUANTITATIVE CRIMINOLOGY 307 (1985); Eleni Apospori and Jeffrey Alpert, *Research Note: The Role of Differential Experience With the Criminal Justice System in Changes in Perceptions of Severity of Legal Sanctions Over Time*, 39 CRIME AND DELINQUENCY, 184 (1993).

will be more important.<sup>68</sup> Since “urban criminals’ perceptions of punishment risks prevailing in their areas have virtually no systematic correspondence with reality,” the first task of an effective deterrence regime is to truthfully inform prospective criminals about their probability of arrest and the sanctions they face upon arrest.<sup>69</sup> While criminals have some information about the risks they face, they do not have adequate information for deterrence to be effective.<sup>70</sup>

There are many types of sanctions, not just imprisonment. Zimring and Hawkins categorize these sanctions as: (1) economic deprivation (fines or seized property); (2) loss of privilege, such as the right to vote or standing to drive; (3) institutional confinement; (4) physical pain and death; and (5) social stigmatization.<sup>71</sup> Some criminals prefer short prison terms to longer terms of probation.<sup>72</sup> Many criminals are indifferent between prison and electronic monitoring.<sup>73</sup> Some criminals even state that fines are equivalent to prison.<sup>74</sup> For most people, social stigmatization is the most powerful deterrent to criminal behavior.<sup>75</sup>

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<sup>68</sup> This implicitly assumes that severity only includes longer sentences rather than harsher conditions. However, harsher conditions would likely be declared unconstitutional because of the Eighth Amendment prohibition of cruel and unusual treatment.

<sup>69</sup> KENNEDY (2009), *supra* note 2 at 25 (citing Kleck *et al*, *The Missing Link in General Deterrence Research*, 43 *CRIMINOLOGY* 623, 644 (2005))

<sup>70</sup> *Id.* Criminals get information from websites like Don Diva (<http://dondivamag.com>), but most criminals do not have adequate information about the sentences they face.

<sup>71</sup> *Id.* at 32 (citing Franklin Zimring and Gordon Hawkins, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 5 (1973)).

<sup>72</sup> *Id.* at 37 (citing Ben M. Crouch, *Is Incarceration Really Worse? Analysis of Offenders’ Preference for Prison over Probation*, 10 *JUSTICE QUARTERLY* 67 (2006)).

<sup>73</sup> *Id.* (citing William Spelman, *The Severity of Intermediate Sanctions*, 32 *JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY* 107 (1995))

<sup>74</sup> *Id.* (citing David C. May *et al*, *Predicting Offender-Generated Exchange Rates: Implications for a Theory of Sentence Severity*, 51 *CRIME AND DELINQUENCY* 373 (2005)).

<sup>75</sup> *Id.* at 40-41.

Unfortunately, sometimes arrests and convictions can lower deterrence by lowering social stigmatization for an offender or a community at large.<sup>76</sup>

Enforcement regimes also need to concentrate their resources to counteract positive feedback in rates of offending.<sup>77</sup> This is because, in a group of generally well-behaved individuals, enforcement can concentrate on a small number of offenders, delivering swift and certain sanctions, and the resulting near-certainty that offending will lead to punishment will deter offending.<sup>78</sup> In contrast, the same amount of enforcement attention to a badly-behaved population will lead only to delayed and sporadic punishment, eroding the deterrence scheme.<sup>79</sup>

Lastly, enforcement regimes need to concern themselves with legitimacy and procedural justice. Tom Tyler states that people accept adverse adjudication proceedings more readily if they feel that the court procedures used to handle their cases are fair.<sup>80</sup> Furthermore, people are less likely to reoffend if they believe that the procedures used to convict and sentence them are procedurally fair.<sup>81</sup> This applies to both formal proceedings such as trials, as well as informal proceedings such as settlement conferences, mediation sessions, and arbitration hearings.<sup>82</sup> Tyler defines procedural justice as including: (1) voice (being able to tell their side of the story in their own words), (2) neutrality, (3) respect, and (4) trust. The social

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<sup>76</sup> *Id.* at 61-64.

<sup>77</sup> KLEIMAN, *supra* note 2, at 3.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Tom Tyler, *Procedural Justice and the Courts*, 44 COURT REVIEW 26 (2007)

<sup>81</sup> See e.g. Tom Tyler *et al.*, *Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders' Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment*, 41 LAW AND SOCIETY REVIEW 553 (2007).

<sup>82</sup> *Id.*

experiments by Kennedy and Kleiman use procedural justice in the administration of policing, probation, and parole.

To summarize, empirical research suggests an ideal criminal justice system would have several traits: (1) certainty of punishment, (2) swiftness of punishment, (3) concentration of resources, (4) direct communication of deterrent threats to likely offenders, and when possible (5) the use of social stigmatization to reduce crime. Also, an ideal criminal justice system should include principles of procedural justice. Note that an ideal system does *not* frequently use severe punishments, unlike our current criminal justice system. Severity is both expensive and incompatible with swiftness and certainty, as the more severe a sentence the more reluctantly it will be imposed and the more “due process” it requires.<sup>83</sup>

#### b. Examples of Successful Criminal Justice Interventions

The six principles above have been successfully used across the country in experimental interventions to reduce crime and violence. Interventions have been designed to reduce gang violence, eliminate flagrant street-level drug dealing, and control probationers and parolees.

##### i. Operation Ceasefire

Operation Ceasefire was a successful intervention to address gun violence using problem-oriented policing.<sup>84</sup> It was a collaborative effort among: Harvard researchers; Boston Police Department anti-gang units; probation officers; local and federal prosecutors; Alcohol, Tobacco, and Firearms (ATF) agents; fugitive apprehension officers from the Massachusetts

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<sup>83</sup> KLEIMAN, *supra* note 2, at 3 (citing James Q. Wilson, *Penalties and Opportunities*, in *A READER ON PUNISHMENT* 195 (Antony Duff and David Garland eds. 1994))

<sup>84</sup> KENNEDY (2009), *supra* note 2, at 3-4.

Department of Youth Services; and gang outreach workers (“streetworkers”).<sup>85</sup> Probation officers ordered members of Boston’s gangs who were on probation into a series of face-to-face meetings called “forums”.<sup>86</sup> At the forums, the drug crew members were told that if anyone in the crew killed someone, the whole crew would be punished for other crimes and violations, including drug sales, drug use, gun carrying, outstanding warrants, probation and parole violations, etc.<sup>87</sup> The idea was to create peer pressure in the group to refrain from violence.<sup>88</sup>

Offenders were also told that if they wanted off the street, help would be available from streetworkers, social-service agencies, probation and parole officers, churches, and nonprofit organizations.<sup>89</sup> This help would include whatever was available, which might include jobs, education, counseling, mentoring, etc. Members of the community, including ministers, parents of murdered children, neighborhood residents, and others, then talked to the gang members and told them that the violence was wrong and it had to stop.<sup>90</sup>

Two crackdowns occurred, where all members of two small drug crews were arrested and sent away for long prison terms. After that, homicide in Boston fell by about 70% in three years.<sup>91</sup> Similar interventions in other cities found large effects compared to similar cities

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* Boston’s 70% decrease in homicide was on an absolute basis and not in comparison to other similar cities.

without targeted interventions – generally an immediate 30%-40% reduction in homicide rates.<sup>92</sup>

## ii. High Point Intervention

High Point, North Carolina had a serious problem with overt drug markets in the 1990s and early 2000s.<sup>93</sup> In order to solve the problem, the city created a task force that included: the High Point Police Department (HPPD), the US Attorney, the Guilford County District Attorney, probation, parole, ATF agents, the DEA, the FBI, numerous city agencies, service providers, churches, community groups, and researchers from Harvard, Winston-Salem State University, and the University of North Carolina-Chapel Hill.<sup>94</sup>

The City of High Point's goals were to get rid of the overt drug markets and the problems associated with them, which included homicide, gun assault, robberies, sexual assault, prostitution, and poor community quality of life.<sup>95</sup> Another goal of the High Point Intervention was addressing racial conflict between communities and law enforcement while reducing the individual and community harm produced by traditional drug enforcement.<sup>96</sup>

The High Point Intervention permanently closed all of High Point's overt drug markets, one market at a time.<sup>97</sup> Interventions started with frank discussions first among law enforcement, then between law enforcement and the community.<sup>98</sup> These discussions started

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 144.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 145-151.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 148-161.

<sup>98</sup> *Id.* at 149-151.

behind closed doors, and then in open-door sessions.<sup>99</sup> These discussions allowed law enforcement to understand that conventional law enforcement and its attendant high rate of incarceration destroyed communities, while the community understood that it needed to set clear standards about right and wrong, and that no one could enforce these standards from the outside.<sup>100</sup>

HPPD detectives then investigated and identified all active drug dealers.<sup>101</sup> Investigative techniques were then used to make cases against all of them.<sup>102</sup> Dealers known to be violent were arrested. Cases against nonviolent drug dealers were “banked”: taken to the point that a warrant could be signed and then held there. This allowed law enforcement to tell dealers that if they kept dealing they would certainly be arrested.<sup>103</sup>

Law enforcement, along with a local minister, made home visits to the dealers and their “influentials.”<sup>104</sup> The dealers were told that they had been identified as drug dealers by undercover buys, and that they could avoid arrest and prosecution by attending a “call-in”, where the city would offer to help the drug dealers leave criminal life and give them an ultimatum to stop dealing.<sup>105</sup> Law enforcement’s willingness to *not* arrest most dealers made a profound impression on the community, and most dealers stopped dealing and signed up for city-provided services.<sup>106</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 152-153.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 153-155.

<sup>104</sup> *Id.* at 155.

<sup>105</sup> *Id.* at 155-157.

<sup>106</sup> *Id.*

### iii. Hawaii's Opportunity Probation with Enforcement (H.O.P.E.)

Probation enforcement in most places is ineffective; probation officers have to supervise too many probationers, and many probationers are eventually sent to prison for long terms after multiple violations of their probation terms.<sup>107</sup> Judge Alm in Hawaii found a way to make probation effective for problem users of methamphetamine, the most abused drug in Hawaii.<sup>108</sup>

Probation officers don't have time to write up all probation violations.<sup>109</sup> And, revocation hearings for long prison terms are extremely time-consuming and strongly contested by defense attorneys.<sup>110</sup> So, probation officers jawboned those who would listen into compliance, and only started revocation hearings for those who would not listen and had accumulated violation records that made a strong case for revocation.<sup>111</sup>

Judge Alm reformed Hawaii's probation system using the idea of informing problem probationers at the beginning of the program that they would face swift and certain punishments for probation violations, and then following through on those punishments.<sup>112</sup> He decided to start with the worst offenders, those that probation officers were writing up for revocation.<sup>113</sup> Instead of revoking probation, Judge Alm decided to give a short jail sentence (originally seven days, now two) every time a probationer in the "worst offender" group

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<sup>107</sup> KLEIMAN, *supra* note 2, at 35.

<sup>108</sup> *Id.* at 34-48.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 34-48.

<sup>113</sup> *Id.* at 36.

violated his probation.<sup>114</sup> All H.O.P.E. probationers were assigned a color, and had to call a hotline every day to see which randomly selected color came up.<sup>115</sup> If the probationer's color was assigned via hotline, the probationer had to take a drug test before 2 PM that day.<sup>116</sup> Probationers who missed or failed a drug test had probation modification hearings scheduled that day or early the next day, with the probationer in jail overnight.<sup>117</sup> If probationers wouldn't come in voluntarily, Judge Alm convinced the U.S. Marshals to arrest the probationer (Judge Alm had been a U.S. Attorney).<sup>118</sup> Before a probationer was eligible for H.O.P.E., he told them that they were going to be under close scrutiny, and that every violation was going to result in a short jail term.<sup>119</sup>

H.O.P.E. worked very well. Violations continued to decrease, and those on the H.O.P.E. program for three months saw their violation rates decrease by 90%.<sup>120</sup> H.O.P.E. probationers were arrested less often, and for less serious crimes, than comparable non-H.O.P.E. probationers.<sup>121</sup> A comparison group of problem probationers saw their violation rate increase over time, as they realized there would be few consequences for their misbehavior.<sup>122</sup>

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<sup>114</sup> *Id.* at 39.

<sup>115</sup> *Id.* at 40.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 37.

<sup>118</sup> *Id.* at 38.

<sup>119</sup> *Id.* at 38-39.

<sup>120</sup> *Id.* at 40.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

By the end of 2008, one in eight felony probationers in Hawaii was assigned to H.O.P.E.<sup>123</sup> Drug users who could not keep away from drugs were sentenced to drug treatment.<sup>124</sup> Both probation officers and probationers saw H.O.P.E. as fair and effective.<sup>125</sup>

#### IV. Evaluating Stuntz's Proposed Solutions

Stuntz's ideal criminal justice system is only partially consonant with the ideal system of Kennedy and Kleiman. Below, I evaluate each of Stuntz's suggested changes through the perspective of Kennedy's and Kleiman's social experiments in order to better evaluate Stuntz's recommendations. Stuntz's focus on increasing the number of police and reducing sentence severity are consonant with Kennedy's and Kleiman's view of better policing and less severe sentences. In contrast, Stuntz's focus on more and better jury trials is not shared by Kennedy and Kleiman. In some ways, more and better jury trials conflict with the visions of American criminal justice developed by Kennedy and Kleiman.

Stuntz believes that criminal law and procedure should reinforce the rule of law, equal protection, and local democracy. Near the end of *The Collapse*, Stuntz lists several recommendations for the American criminal justice system. These recommendations are: (1) state and federal governments should subsidize police officers and charge for prison beds; (2) reduce the severity of criminal sentences; (3) subject sentences to judicial review for proportionality and racial discrimination (or change statutes to do this); (4) increase funding for indigent defense, and in exchange, reduce judicial oversight of ineffectiveness of counsel

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<sup>123</sup> *Id.* at 41.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 40.

claims, (5) stringent review of the factual basis of guilty pleas with little deference to the pleas themselves; (6) changing criminal law to reintroduce *mens rea* (criminal intent) or at least allowing defendants to claim that while they are guilty of wrongdoing, they are not deserving of punishment (or at least not deserving of harsh punishment); (7) more jury trials, with juries drawn from neighborhoods (with fewer peremptory challenges), and not counties; and (8) allow federal sentences to apply only if federal criminal law is exclusive.

In contrast, Kennedy and Kleiman recommend a criminal justice system that emphasizes (1) certainty of punishment, (2) swiftness of punishment, (3) concentration of resources, (4) direct communication of deterrent threats to likely offenders, (5) when possible, the use of social stigmatization to reduce crime, and (6) procedural justice.

a. State and Federal Governments Should Subsidize Police Officers and Charge Localities for Prison Beds

Stuntz recommends that state and federal governments together pay half the cost of local policing (at about \$34 billion per year), and that local governments should pay for half the prison beds they use (at about \$21 billion per year). This is actually two different policies, made into one: (1) have state and federal government together pay for half of local police, and (2) make local governments pay for half of all the state-level prison beds they use.

i. Have State and Federal Governments Together Pay Half the Cost of Local Police

Increasing the number of local police is where Stuntz's and the Kennedy/Kleiman views most overlap. For Stuntz, more police is important because police are controlled by the level of government closest to local neighborhoods. Residents of crime-ridden neighborhoods have more contact with the police than any other part of the criminal justice system. Historically, more police have led to low crime and low incarceration rates. According to Stuntz, Northern cities a century ago were adequately policed, and had low crime rates and low incarceration rates.<sup>126</sup> This contrasts with Southern cities which were poorly policed and had much higher rates of crime and incarceration.<sup>127</sup>

For Kennedy and Kleiman, more police are important because they increase both the certainty of punishment and the ability to concentrate resources in crime-ridden areas without leaving other areas underpoliced. Having state and federal government together pay for half of local police costs would be a major change. The change would be so large that it is difficult to estimate its effects on total police and crime rates. This is especially true because localities would have to pay for half of their prison incarceration rate, so the total effect of the program on the number of police and crime is extremely difficult to accurately predict. Past federal programs to pay for police, most notably the COPS program, were comparably small, so the effects of those programs are not indicative on the effect that Stuntz's suggested program would have on the number of police and crime rates.

The effect of having state and federal government together pay for half of local police costs on the total number of police and on crime could be large. Estimates of the effect of

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<sup>126</sup> STUNTZ, *supra* note 3, at 288.

<sup>127</sup> *Id.*

police on crime are large; crime decreases almost 0.5% for each 1% increase in police, with larger effects on homicides.<sup>128</sup> If Stuntz's program is implemented in a way that the most crime-ridden areas have higher subsidies (and areas with lower crime rates lower subsidies), the effect of more police on crime would likely be very large, even for large increases in police.

ii. Make Localities Pay for Half the Cost of Prison Beds

Stuntz recommends that localities be forced to pay for half the cost of incarceration from their communities. Currently, since each locality is only a small fraction of the state, their citizens only pay a small fraction of total incarceration expenditures.<sup>129</sup> The effects of this policy on crime are uncertain because this type of program has never been tried. Since money tends to flow downwards to localities from state and local government, not upwards, there are very few similar programs. Conceivably, four different outcomes (or a mix of such outcomes) are possible if local governments have to pay the state for incarceration: (1) smarter policing that both reduces crime and reduces incarceration (like the High Point Intervention and Operation Ceasefire),<sup>130</sup> (2) more lenient sentencing, (3) less policing in disadvantaged neighborhoods, and/or (4) a larger proportion of federal prosecutions in place of state prosecutions. The first two of these outcomes would be good, while the last two would be poor.

Given the uncertainty associated with a policy of making localities pay for half the cost of their prisoners, such a policy needs to be phased in slowly to give federal, state, and local

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<sup>128</sup> Steven Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effects of Police on Crime: Reply*, 92 AMERICAN ECONOMIC REVIEW 244 (2002).

<sup>129</sup> New York City is an exception, as it contains 42% of the population of the state of New York. Los Angeles County has 26% of California's overall population, so it is another exception.

<sup>130</sup> KLEIMAN, *supra* note 2.

governments time to evaluate. This would both ensure that having localities pay a portion of the cost of incarceration serves public safety goals and allow for policy adjustments.

#### b. Reduce the Severity of Criminal Sentences

Since the severity of criminal sentences has little deterrence value, there is little downside to gradually reducing the severity of criminal sentences. Reducing the severity of criminal sentences could be politically difficult, but some states (most notably New York) have decreased the severity of drug-related sentences. If decreases in sentencing severity occurred at the same time more police officers were added, the policy might be more politically palatable because the increased police presence would reduce crime.

As Stuntz mentions, the easiest way to reduce the severity of sentences is to have more effective, H.O.P.E.-style probation and parole programs to reduce the revocation of probation and parole.<sup>131</sup> In a one-year randomized controlled trial, HOPE probationers were 55% less likely to be arrested for a new crime and 53% less likely to get their probation revoked.<sup>132</sup> Versions of H.O.P.E. are already being tried in other states, and the program's success elsewhere will likely lead to more people being sentenced to probation and earlier parole, given that H.O.P.E.-style programs are much more effective than incarceration for many crimes.<sup>133</sup>

#### c. Making Judicial Review of Sentences More Stringent

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<sup>131</sup> STUNTZ, *supra* note 3, at 295.

<sup>132</sup> National Institute of Justice, THE IMPACT OF HAWAII'S HOPE PROGRAM ON DRUG USE, CRIME, AND RECIDIVISM (2010). Retrieved at [http://www.pewcenteronthestates.org/uploadedFiles/PSPP\\_HOPE\\_Brief\\_web.pdf](http://www.pewcenteronthestates.org/uploadedFiles/PSPP_HOPE_Brief_web.pdf).

<sup>133</sup> See Pew Center on the States, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS (2011) (found that the three-year return-to-prison rate for inmates released in 2004 was 43.3%, not including jail admissions).

i. Subjecting Sentences to Judicial Review for Proportionality and Racial Discrimination

Stuntz believes strongly that judges should subject sentences to judicial review for proportionality and racial discrimination. The Supreme Court largely rejected judicial review for racial discrimination in *McCleskey* and *Armstrong*. For adults, the Supreme Court rejected proportionality review in *Lockyer v. Andrade* (2003),<sup>134</sup> where a repeat offender received a fifty years-to-life sentence for stealing nine videotapes based on California's three strikes law. Stuntz's judicial review proposal is fairly stringent; he not only recommends that the Supreme Court overturn *McCleskey* and *Armstrong*, but he also recommends that for all sentences over some minimal level, prosecutors should be required to show that sentences at least as severe have been imposed some minimum number of times for the same crime in the same state on similar facts.<sup>135</sup>

For extreme cases like *McCleskey* and *Andrade*, judicial review for racial discrimination and proportionality would help make sentences fairer and more just. But, outside of extreme cases, judicial review for racial discrimination and proportionality would be difficult to apply in practice. If prosecutors decided that they would only use federal sentences as part of a task force to clean up overt drug markets, like those in Operation Ceasefire and the High Point Intervention, then almost all federal drug inmates would be nonwhite because there are very few overt drug markets in White neighborhoods. This doesn't seem discriminatory, but instead an efficient use of federal resources. However, judicial review for racial discrimination as Stuntz

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<sup>134</sup> *Lockyer v. Andrade*, 538 U.S. 63 (2003).

<sup>135</sup> STUNTZ, *supra* note 3, at 297.

suggests might overturn these sentences. That would be counterproductive to interagency cooperation and crime reduction.

Similarly, proportionality review might be problematic under a regime dominated by Operation Ceasefire and High Point-type interventions. From the outside, judges would notice rare severe sentences for what seemed like relatively unimportant drug and gun violations. But in reality, these sentences would be for being part of a gang that didn't cooperate with police and the community when given a credible threat of incarceration. Credible threats rarely have to actually be used. But, those threats need to be available, and proportionality review might remove those credible threats.

Judicial review for proportionality and racial discrimination could have other harmful effects. The current incarceration rate for African-Americans is about six times as high as that for white Americans; white Americans are incarcerated at a rate of about 400 per 100,000 residents, and black Americans are incarcerated at a rate of about 2,400 per 100,000 residents.<sup>136</sup> Judicial review for racial discrimination could lead to increased incarceration for non-African Americans, and increased incarceration overall if state and local governments reacted to a requirement of equal sentences for black and white offenders by increasing sentences for white offenders. Given the increase in incarceration of whites over the last forty years, this is actually a more likely outcome than just a decrease in incarceration for both whites and blacks. However, the effects of judicial review for racial discrimination are

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<sup>136</sup> Bureau of Justice Statistics, PRISON INMATES AT MIDYEAR 2009 – STATISTICAL TABLES (2010) (number of prison and jail inmates); U.S. Census Bureau, TABLE 3, ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SEX, RACE, AND HISPANIC ORIGIN FOR THE UNITED STATES: APRIL 1, 2000 TO JULY 1, 2009. (population by race). Retrieved at <http://www.census.gov/compendia/statab/2012/tables/12s0006.pdf>

unpredictable, and localities might refuse to arrest whites for certain types of crimes, regardless of judicial interventions.

ii. Stringent Review of the Factual Basis of Guilty Pleas with Little Deference to the Pleas Themselves

Stuntz recommends that the rest of the country should follow the model of a few state appellate courts (and the military system) and review the factual basis of guilty pleas with great care and with little deference to the pleas themselves.<sup>137</sup> In Stuntz's view, such review would (1) lead to fewer guilty pleas, (2) would make the remaining pleas more accurate, and (3) shift power from prosecutors to judges.

The empirical work of Kennedy and Kleiman has little to say about this type of judicial review. If judicial review of guilty pleas results in more accuracy, then it helps deterrence because it would give people living in crime-ridden neighborhoods more incentives to not commit crimes. Shifting some power from prosecutors to judges could also help discipline prosecutors to make their prosecutions in line with community consent, as the prosecutions in Operation Ceasefire and the High Point Intervention were conducted.

Guilty pleas are judged according to (some) contract principles, and the ability of appellate judges to scrutinize these "contracts" may make prosecutors less likely to make them. On the other hand, this doctrine may serve to mitigate the worst prosecutorial injustices (similar to the contract doctrine of unconscionability) and leave most plea bargains unaltered.

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<sup>137</sup> STUNTZ, *supra* note 3, at 302-03.

More stringent review of guilty pleas could decrease crime if it led to defendants feeling that their adjudication was fairer. If guilty pleas were scrutinized only at the appellate level, defendants might not see this as procedurally more fair because defendants generally don't have an opportunity to voice their concerns at the appellate level; lawyers file briefs and not defendants. More stringent review at the trial level, before a plea is entered, might serve to enhance procedural justice as defendants could discuss their plea deals with judges, rather than being forced to accept plea deals given to them under the threat of an extremely long prison sentence if convicted at trial.

d. More and Better Jury Trials

i. More Jury Trials, with Juries Drawn from Neighborhoods and Fewer Peremptory Challenges

For Stuntz, more jury trials, with juries drawn from neighborhoods and fewer peremptory challenges, are important because these jury trials would give the criminal justice system local democracy (and therefore legitimacy) that it now lacks. Stuntz writes that “[i]f a prosecutor cannot convince residents of a high-crime community that one of their neighbors should be punished, then punishment is probably unwise and could well be unjust.”<sup>138</sup> Stuntz also notes that community-based juries could lead to community-based prosecution, which would be much more responsive to local communities than current county-based prosecution.<sup>139</sup>

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<sup>138</sup> *Id.* at 304.

<sup>139</sup> *Id.* at 305.

In contrast, empirical research provides little support for the notion that specifically juries matter. Procedural justice requires voice, neutrality, respect, and trust. Jury trials often don't provide voice for defendants, as they are often counseled not to testify. Furthermore, it is far from clear that courts are viewed by defendants as neutral, or worth respect and trust. Most continental European countries have no jury system or only have split panels of judges and lay jurors for murder and other serious crimes. Procedural justice and legitimacy do not require jury trials.

Also, juries do not enhance deterrence. Deterrence demands that sentences be swift and certain, rather than severe. In that context, more judicial scrutiny of guilty pleas, as recommended above, would be sufficient. Juries would likely reduce both the swiftness and certainty of punishment.

Furthermore, jury trials present serious problems in gang-infested neighborhoods. The Sixth Amendment requires that a defendant be able to cross-examine prosecution witnesses. Stuntz himself notes that "violent street gangs in the United States do an effective job of intimidating witnesses."<sup>140</sup> A more logical system in the face of widespread witness intimidation would force guilty pleas and have those pleas examined closely on review, rather than let gang members go free due to witness intimidation. Also, Operation Ceasefire prosecuted gangs rather than individuals. Jury procedures are designed for individuals and not groups, so prosecution of gangs in jury trials could be problematic.

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<sup>140</sup> *Id.* at 79.

Drawing juries from neighborhoods has serious problems, including determining suitable neighborhood boundaries. There is no clear way to divide neighborhoods into communities of interest, and communities change. Even if the problem of determining suitable neighborhood boundaries for jury selection is solved, there is still the problem of determining from which neighborhood a jury should be drawn from when a person from one neighborhood commits a crime in another neighborhood. Regardless of which neighborhood is chosen, the result would likely inflame racial tensions if the neighborhoods have very different demographics. If the defendant is from a majority-minority neighborhood and a jury drawn from his neighborhood acquits, the victimized mostly-white neighborhood is not going to accept the result as fair. If that same defendant gets a jury drawn from the mostly white neighborhood where the crime is committed, then the defendant's neighborhood might not accept the result, further damaging the legitimacy of the criminal justice system. A jury drawn from both neighborhoods might be a decent compromise, but the result might not feel legitimate to either neighborhood.

However, allowing juries to be drawn at the municipal level avoids some of these problems as many public goods are already provided at that level (like police), so people are more likely to accept juries drawn at the municipal level. Furthermore, for cities larger than a certain size, prosecution should be elected at the city level; this would make prosecution more representative of the community's wishes when the city is majority-minority but the county overall is not.

ii. Increase Funding for Criminal Defense and Reduce Judicial Oversight of Ineffectiveness of Counsel Cases

More funding for indigent defense is necessary to make jury trials fair, and would be even more necessary if there are to be more jury trials—even if jury trial procedures were simplified. In 2010, Attorney General Eric Holder stated that indigent defense was in “crisis” and that crisis has continued.<sup>141</sup> Indigent defense is criminal defense, given that over 80% of the accused cannot afford to hire a lawyer.<sup>142</sup> Per-case spending on lawyers for indigent defense fell by half between 1979 and 1990.<sup>143</sup> Indigent defense today may be insufficient to provide meaningful assistance to defendants.

The work of Kennedy and Kleiman has little to say about the optimal role and funding of defense counsel. If there are going to continue to be few jury trials, then public defenders aren’t needed for those trials. If there is to be more stringent review of guilty pleas, then public defenders could be useful in presenting evidence for that review.

Releasing localities from ineffectiveness of counsel claims if they provide enough money for defense is unlikely to be much of an incentive. Relatively few cases are overturned due to Sixth Amendment ineffectiveness of counsel claims, so there is little incentive for localities to avoid those claims.<sup>144</sup>

e. Reforming Criminal Law

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<sup>141</sup> *Justice Dept. to Launch Indigent Defense Program*, NPR. February 26, 2010.

<sup>142</sup> *Id.*

<sup>143</sup> STUNTZ, *supra* note 3, at 256.

<sup>144</sup> Brandon Garrett, *Judging Innocence*, 108 COLUM. L.R. 107 (2008)

i. Changing Criminal Law to Reintroduce *Mens Rea* (Criminal Intent) or  
Allowing Defendants to Claim That They Are Not Deserving of  
Punishment

Changing criminal law to reintroduce *mens rea* (criminal intent) is probably the most radical of the proposed changes in this section. Arguably, the reintroduction of *mens rea* would invalidate drug possession and drug possession with intent to distribute statutes (or at least make them very difficult to enforce).<sup>145</sup> Stuntz suggests that the Supreme Court should have invalidated drug possession statutes as part of an expanded right to privacy<sup>146</sup> and remarks approvingly that the Eighteenth Amendment and the Volstead Act did not prohibit use or possession of alcohol.<sup>147</sup>

A fair, effective, and efficient criminal justice system doesn't require *mens rea*; the Kennedy and Kleiman social experiments work with the criminal law we currently have. *Mens rea* is a concept of the common-law based criminal justice system we once had, not the mixed system we have today with many general intent crimes. The reinstatement of *mens rea* would limit police and prosecutorial discretion, and the value of that would have to be balanced against the increased difficulty of conviction for some crimes, especially drug possession charges. The social experiments of Kennedy and Kleiman might benefit from general intent crimes because of the increased ability to convict those who violate both the law and

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<sup>145</sup>Regina v. Lambert, [2001] UKHL 37.

<http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd010705/regina-1.htm>

<sup>146</sup> STUNTZ, *Supra* note 3, at xxx

<sup>147</sup> *Id.* at 180.

community norms by drug sales and violence. However, police and prosecutors can still convict criminals without general intent crimes.

Allowing defendants to claim that while they are guilty of wrongdoing, they are not deserving of punishment (or at least harsh punishment) would be congruent with the general reduction in severity recommended by Stuntz, Kennedy, and Kleiman. This would require the (legislative or judicial) repeal of mandatory minimum sentences, but this would be a less drastic change to our current criminal justice system. Furthermore, with *United States v. Booker* (2005),<sup>148</sup> this movement has already begun. Repealing mandatory minimum sentences would allow for the use of H.O.P.E.-style community corrections for more offenders. For many offenders, H.O.P.E.-style community corrections would reduce costs (both to the public and to the offender) and recidivism rates compared to incarceration.

ii. Allow Federal Sentences to Apply Only if Federal Criminal Law is Exclusive

Stuntz recommends that federal sentences should apply only if federal criminal law is exclusive. In practice, this would repeal federal law for crimes where state law is usually used to prosecute criminals. On the surface, this is an attractive method of maintaining federalism and reducing prosecutorial discretion. In practice, having federal sentences only apply where federal law is exclusive would be unwise because it would make the federal government less likely to assist state and local governments. There is much less institutional incentive for federal government agencies (like the FBI and DEA) to be helpful if they aren't allowed to engage in prosecutions.

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<sup>148</sup> *United States v. Booker*, 543 U.S. 220 (2005) (federal judges can depart from sentencing guidelines).

Note that both Operation Ceasefire and the High Point Intervention used federal assistance and stiff federal sentences to help investigate gangs and to deter gang members from committing violent acts. Allowing federal sentences to apply only if federal criminal law is exclusive would threaten such collaboration, which has proven fruitful in anti-gang contexts.

## V. Conclusions

Stuntz and Kennedy and Kleiman have different explanations for why people commit crime and why communities become crime-ridden. Stuntz believes that people commit crimes because the criminal justice system lacks legitimacy,<sup>149</sup> and that this legitimacy needs to be rebuilt through local democracy, including more jury trials, with juries chosen from neighborhoods most affected by crime. In contrast, Kennedy and Kleiman believe that young men without strong social bonds commit crimes because there is little chance they will be caught. Therefore, crime can be deterred by greatly increasing the certainty of punishment and communicating that certainty to offenders. This deterrence is especially effective as it draws on and strengthens existing social bonds in the communities most affected.

So, how do we choose between the visions of reform of Stuntz and Kennedy/Kleiman? In some cases we don't have to choose; both agree that there should be more police and less severe sentencing. These interventions alone would greatly decrease crime. Furthermore, by decreasing incarceration, the reforms would pay for themselves. Places that have chosen to significantly increase the number of police, most notably New York City, have been rewarded

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<sup>149</sup> STUNTZ, *supra* note 3, at 29.

with less crime and lower rates of incarceration.<sup>150</sup> In contrast, those places that have not significantly increased the number of police have seen very little reduction in crime. New York has recently repealed much of the severe Rockefeller Drug Laws; this should help continue the reduction in incarceration that New York has seen in recent years.

Both Stuntz and the Kennedy/Kleiman views of ideal criminal justice recommend the elimination of mandatory minimum sentences, and therefore would be amenable to the idea that even though a defendant may be guilty of a crime, that they are not deserving of punishment.

Stuntz's idea of drawing juries from sub-county-level areas does not conflict with the views of Kennedy and Kleiman. While Stuntz recommends that juries be drawn from neighborhoods rather than cities; he would believe that city-level prosecutor and juries would be better than county-level prosecutors and juries drawn from county-level populations. Drawing prosecutors and juries from smaller areas could make prosecutors and police responsive to the same population, which would facilitate the intelligently selective prosecution needed for the strategic deterrence strategies recommended by Kennedy and Kleiman.

Stuntz's idea that judges should take a harder look at guilty pleas is consonant with the ideas of Kennedy and Kleiman. There needs to be some check on prosecutorial discretion, and allowing judges to take harder looks at guilty pleas can make sure that police and prosecutors are incarcerating the right person. This is especially true because harsh sentences can force even innocent people to plead guilty, and judicial scrutiny could expose incompetence or

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<sup>150</sup> *Id.* at 288.

corruption between police and prosecutors. It would likely be a useful check if police and prosecutors had to explain their overall strategy for reducing violence and cleaning up neighborhoods to someone who isn't involved in the investigation. Furthermore, a judge is likely to see lots of cases from a local area, allowing them to see patterns, rather than the individual cases a jury would see.

The Stuntz and Kennedy/Kleiman views of American criminal justice disagree on the value of juries and jury trials, judicial review for proportionality and racial discrimination, and changing criminal law to exclude federal sentences if federal criminal law is not exclusive. Stuntz wants more jury trials, judicial review for proportionality and racial discrimination, and excluding federal law if it is not exclusive. Juries are irrelevant to the work of Kennedy and Kleiman. Very few criminal cases go to trial; and the social experiments of Kennedy and Kleiman work with that reality. Judicial review of proportionality and discrimination could overturn sentences of the relatively few people convicted under Kennedy's and Kleiman's social experiments, and undermine the strategic policing that they are trying to institute. Lastly, for Kennedy and Kleiman, the availability of federal sentences for crimes that also have state penalties is important for deterrence and federal cooperation in reducing crime.

Overall, the ideal criminal justice system of Kennedy and Kleiman is more suited to today's crime problems than Stuntz's ideal. Past (and for that matter, present) immigrants were often extremely poor, but they had several advantages over today's poor African-Americans: (1) much higher labor force participation rates,<sup>151</sup> (2) much higher marriage rates

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<sup>151</sup> Robert A. Margo, *The Labor Force in the Nineteenth Century*, in *CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES*, VOLUME 2, 207, 211 (Stanley L. Engerman and Robert E. Gallman, eds.) (2000).

(and therefore much lower rates of female-headed households),<sup>152</sup> (3) higher levels of social capital,<sup>153</sup> (4) living in booming, rather than shrinking, cities,<sup>154</sup> and (5) lower levels of discrimination.<sup>155</sup> Therefore, the comparison of pre-WWI immigrants to today's African-Americans is inappropriate; a more appropriate comparison would compare the criminal justice outcomes of immigrants a century ago to today's Hispanic immigrants. If we control for age, outside of the Northeast, Hispanics have similar incarceration rates to Whites, suggesting that the plight of African-Americans is fundamentally different from the plight of immigrants a century ago.<sup>156</sup>

Interventions such as Operation Ceasefire, the High Point Intervention, and H.O.P.E. are workable models that greatly reduce crime and violence wherever they are instituted. We just need to find out how to shape our institutions to make these models sustainable.

In spite of my disagreements with Stuntz's analysis and policy recommendations, I believe that *The Collapse of American Criminal Justice* is an extremely important book. Stuntz shows that the American criminal justice system, outside the South, used to function well. Both crime and incarceration rates were low, and people felt that the criminal justice system was essentially fair. Furthermore, Stuntz shows that changes in the criminal justice system during

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<sup>152</sup> HERBERT S. KLEIN, *A POPULATION HISTORY OF THE UNITED STATES* 126 (2004) (noting that marriage rates among 19<sup>th</sup> century women were well above 90%).

<sup>153</sup> Gerald Gamm and Robert D. Putnam, *The Growth of Voluntary Associations in America, 1840-1940*, 29 *JOURNAL OF INTERDISCIPLINARY HISTORY* 511 (1999)

<sup>154</sup> See e.g. ANNE POWER ET AL., *PHOENIX CITIES: THE FALL AND RISE OF GREAT INDUSTRIAL CITIES* (2010)

<sup>155</sup> Richard Jensen, *No Irish Need Apply: A Myth of Victimization*, 36 *JOURNAL OF SOCIAL HISTORY* 405 (2002).

<sup>156</sup> Ron Unz, *His-Panic*, *THE AMERICAN CONSERVATIVE*, Mar. 1, 2010. Information from the 2010 Census shows that the Hispanic population in the Northeast (and Hawaii) is predominantly Puerto Rican and Dominican, while outside of the Northeast, Hispanic populations are largely Mexican, except in Florida, where the dominant Hispanic population is Cuban and Maryland and DC, where the dominant Hispanic population is Salvadoran. It is unclear why Puerto Ricans and Dominicans fare so much worse in the criminal justice system than Cubans, Mexicans, and Salvadorans.

the 1960s and afterwards destabilized a successful system and sent it into collapse. We can create a fair, effective, and efficient criminal justice system. We can do better, and we must.