environmental studies and says he spent “thousands of hours” listening to jazz and classical music in the Loeb Music Library. He has lived most of his adult life in California, first in Los Angeles, where he was a story analyst for CBS and a paralegal for A & M Records. Now he lives in a “horse community” near Sacramento, where he works as director of marketing for a technological company—and rides horses. “That’s something I never thought I’d do,” he says. “Own horses.”

Reflecting on his novel, he says, “The history of African-American letters is largely a history of people who take the outside world’s condemnation and destroy themselves by turning it inward. Native Son, Invisible Man, Beloved—these are all people who take the hatred that is spewed at them and internalize it. I got sick of reading those books, because they suggest a passive, pathetic people, which I know I am not from. The fact that these teenagers were fighting back—as a black man, that meant a great deal to me. Win or lose, right or wrong, they went out fighting, and that matters.”

Justice Falls Down
America’s flawed criminal justice system

by Tracey L. Meares

The title of William J. Stuntz’s masterwork, The Collapse of American Criminal Justice, is at first glance a misnomer. “Collapse” does not describe a system that seems to be humming along, processing ever-larger numbers of Americans. Stuntz notes that our rate of incarceration is closing in on 500 inmates per 100,000 people, up sevenfold from a century ago. But upon reflection, the last word of the book’s title really makes his point: it is justice that has collapsed, not the system that purportedly delivers it.

Stuntz, the late Friendly professor of law, was a giant among legal theorists of criminal law and procedure. This reader has long followed his scholarship, which is characterized by impressive originality and quirky counterintuitive claims. In his book, published just months after his tragic early death from cancer at 52 last spring, Stuntz lodges two major complaints about U.S. criminal law and procedure. First, he claims that far too many people are caught up, prosecuted, and incarcerated. Today’s system is directed primarily and often times arbitrarily by over-powerful prosecutors whose discretion is not adequately circumscribed, given the political realities of local urban law enforcement dictated by disinterested suburbanites who also fuel the politics of legislative actions. Second, Stuntz claims that African Americans bear the brunt of official decisionmaking and—primarily because of two sets of Supreme Court decisions—have little power to effect systemic change. In support of these conclusions, Stuntz pursues a fascinating and intricate journey through history, empirical evidence, and judicial interpretation, contrasting our contemporary practices with those of the past.

The book’s first section is a big-picture history. Stuntz creatively compares the country’s crime statistics and punishment practices from the mid nineteenth to the early twentieth centuries (when thousands of mostly European immigrants arrived in the United States and settled primarily in eastern cities) to those from the “Great Migration” (when thousands of southern African Americans moved north). According to Stuntz, white northeastern immigrant defendants in the early nineteenth century were able to protect themselves from injustice without the benefit of constitutional rights and procedures. Instead, they relied upon local politics. The second wave of migrants, black, was unable to deploy comparable political power in the same ways. In the second section of the book, Stuntz explains what he thinks caused the difference in a rich, detailed, and thorough analysis of the jurisprudential path to the constitutional procedures that today are celebrated as the hallmarks of American
criminal justice—and that are, in his view, the basis of its collapse.

Stuntz’s takedown of constitutional criminal procedural rights is striking. He begins with the Founding, pointing out that federal and state criminal law differed entirely from one another at that time, and that policing as we know it was then nascent at best. By the Civil War’s end, however, the local machinery of criminal justice with which we are familiar was largely in place. Critically, that machinery and the substantive criminal law that provides oil to the machine’s gears developed independently of the influence of federal constitutional law. Still, there were failures of justice—for instance, private groups terrorized southern blacks, and state governments were unable to protect them. When the Supreme Court was given an opportunity to interpret the Fourteenth Amendment in a way that would insure that all Americans, especially the newly freed slaves, would enjoy both freedom from government oppression and freedom from private violence, the Court ducked. Stuntz, bluntly and to the point, writes, “The ideal of equal protection…was for all practical purposes dead. So were thousands of southern blacks who needed that protection, and needed it badly.”

But despite the Supreme Court’s failure, he shows that at least in the Northeast, extending into the early twentieth century, criminal justice was largely egalitarian. Cities were the places where the “poor and ordinary workers had the most political clout.” Crime was low compared to today’s rates, and not because we punished more—New York State incarceration rates today are three to four times those of a century ago. Almost shockingly, Stuntz claims that blacks then avoided conviction at the relatively high rates prevalent today (at least in the large industrial cities) not because they lived in racially enlightened times but because all defendants fared better. The prescription: large police forces; low levels of required criminal procedures, which in turn made conducting trials cheap and jury judgments common; and relatively vague, defendant-friendly, substantive criminal law defined primarily by judges, rather than by legislators, as is now the case. Stuntz argues that this elixir, combined with local political control over policing and prosecution, produced the favorable statistics he celebrates.

What Stuntz calls “Earl Warren’s Errors” changed all this. In an attempt to promote civil rights for all criminal defendants, es-

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especially poor African-American ones from the South, the Warren Court crafted a constitutional “code” of criminal procedure specifying a host of rules such as strictures dictating the provision of counsel, the availability of jury trials, the reading of warnings during police interrogation, and the exclusion of evidence when the rules were violated. In an argument bound to infuriate the American Civil Liberties Union, Stuntz argues essentially that rights are wrong—rather than promoting equality of access to justice by rich and poor defendants alike, the Court’s procedural approach exacerbated the gap. Wealthy defendants who already could afford lawyers received even more ammunition to achieve acquittals. Poor defendants, on the other hand, suffered the bite of a political backlash fueled by the perception that the guiltiest defendants were receiving the most procedural protections at a time when crime in cities was skyrocketing.

In his book’s final chapter, Stuntz offers some strategies for repair. He advocates increasing the number of police on the streets, and of prosecutors and defense counsel. More police patrols, he suggests, should lead to crime control through the most politically responsive agency in the system—as he says occurred in the early twentieth century. More lawyers in the system could result in more trials and system transparency, in contrast to the low-visibility plea bargains that dominate convictions today. But local accountability ought to accompany transparency. Stuntz argues, so we also need system changes that promote neighborhood democracy. He is clear-eyed here: he admits that traveling with him requires a major measure of hope. But he remains hopeful nonetheless.

A question one comes away with at the end of his story, though, is whether those who potentially stand to benefit from his diagnosis and recommended therapy—primarily African-American men—agree with him. Twenty-three-year-old community college student and New York Times editorialist Nicolas K. Peart recently has written cogently and compellingly about being stopped and frisked by New York City cops five times since he turned 18. What would Peart say about Stuntz’s proposals? I suspect he’d be quite concerned about a cornerstone of those recommendations: more police on the street. Stuntz’s strategy makes sense. More policing can result in lower levels of crime without increasing imprisonment. It can be a substitute for incarceration as opposed to an automatic conduit to it, as many suppose. But intensified policing potentially brings with it increased estrangement from the police among people like Peart, the very group Stuntz intends to help.

No doubt Stuntz’s solutions—more policing, more prosecutors, more defense counsel, and more opportunities for the community to speak through jury trials about exactly what it will (and will not) tolerate—are potentially useful. But none of these mechanisms is particularly welcome in a world where the group suffering most from the incidence of crime and from the excesses of strategies designed to combat crime distrusts that system and even views it as illegitimate. Simply putting more cops on the street, even if incarceration rates decline, is unlikely to enhance perceptions of the system’s legitimacy.

Somewhat counterintuitively, people typically care much more about how they are treated by law enforcement agents...
than about the particular outcome of the contact—that is, whether they are arrested or not. Research shows that people care about being treated with dignity and respect, and, when encountering police, they look for behavioral signals that allow them to assess whether the officer’s decision to stop or arrest them was made accurately and without bias. Perceptions of good treatment and fairness are the foundations of procedural justice. Social-science evidence from around the world shows that people are more likely to obey the law voluntarily when they believe that authorities have the right to tell them what to do. In fact, people may be at least as motivated to comply with the law by the belief that they’re being treated with dignity and fairness as by fear of punishment. When police generate good feelings in their everyday contacts, it turns out that people are motivated to help them fight crime.

In this significant work, Stuntz recognizes the importance of this kind of legitimacy. “[W]hen the justice system seems legitimate to the young men it targets,” he writes, they “are more likely to follow the system’s rules. When that justice system seems illegitimate to those same young men, crime becomes more common and harder to control.”

My colleague, Tom Tyler, who has done the foundational work in this area, would argue that procedures, not substance, are the keys to enhancing legitimacy. The kind of procedures engineered by the Warren Court likely are not particularly helpful. Transparency is. And so are rules that help to identify wrongdoers with accuracy and that help to dampen bias. Procedures that allow participation—juries, yes, but also stop-and-arrest processes that give the target a chance to tell her side of the story—are critical. Perhaps most importantly, legitimacy is created when policymakers welcome the help of high-crime communities in developing crime-control strategies, and when police officers focus on courtesy and respect in interactions with citizens.

Nicolas Peart may not disagree with Bill Stuntz’s analysis at the end of the day, but I am less confident that Peart would welcome Stuntz’s proposed remedies, no matter how closely they are tied to his critical diagnosis. Addressing this country’s addiction to imprisonment is not the same as attempting to repair the con-

sequences of our sad history with respect to race and crime. I think Stuntz is right on the money on the first, but the second needs a concerted effort toward racial reconciliation in criminal justice.

Bill Stuntz was a remarkable human being. In addition to being a towering intellect, he was a singularly humble man who regularly wrote for a blog (begun with a fellow law professor and evangelical Protestant) named Less than the Least. The Collapse of American Criminal Justice teaches us a great deal despite any flaw we may find in it. And even going part of the way with Bill is a path worth walking.

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Henry Friendly: Greatest Judge of His Era, by David M. Dorsen ’56, J.D. ’59 (Harvard, $35). The life, thought, and work of the jurist (’23, LL.B. ’27, LL.D. ’71)—most prominently of the U.S. Court of Appeals for the Second Circuit—are analyzed comprehensively. In the foreword, the Honorable Richard A. Posner, LL.B. ’62, who is in a position to know (Seventh Circuit), says of the work, “[W]e learn more about the American judiciary at its best than we can learn from any other biography.”

The Missing Martyrs, by Charles Kurzman ’86 (Oxford, $24.95). A professor of sociology at UNC Chapel Hill finds Muslim terrorists a marginalized and declining cohort, despite young Muslims’ alienation from perceived Western support for discredited governments in the Islamic world (some of them, of course, now being swept away).

Kayak Morning, by Roger Rosenblatt, Ph.D. ’68 (Ecco, $12.99 paper). A highly personal reflection on grief, following Making Toast, the author’s book about the death of his adult daughter.

The “Enemy Alien Menace” looms over lower Manhattan: The New York Herald, March 28, 1918; cartoon by W.A. Rogers

The Novel after Theory, by Judith Ryan, Weary professor of German and comparative literature (Columbia, $29.50). Surrounded by literary theory, novelists began to imbibe and incorporate it into their fictions. Ryan examines the results in works by Don DeLillo, Thomas Pynchon, Margaret Atwood, and others.

Demand: Creating What People Love Before They Know They Want It, by Adrian J. Slywotzky ’73, J.D. ’76, M.B.A. ’80, and Karl Weber, B ’91 (Crown Business, $27). A consultant and a business writer examine triggers, trajectories, and launchings from Kindle and Teach for America through marvels yet unknown and undesired. They might make a good panel with Charles Dhugg, above, on the intersection with willpower.

Miss Fuller, by April Bernard ’78 (Steerforth Press, $14.99). A short historical novel about Margaret Fuller, journalist and women’s-rights pioneer. It begins with an ending: a shipwreck. (The author, a poet and novelist, was profiled in “Noir Romanitic,” November-December 2010, page 24.) For voracious readers of a factual bent, pretty nearly all the facts concerning Fuller are in The Lives of Margaret Fuller (Norton, $32.95), a new biography by John Matteson, J.D. ’86, whose Alcott family biography—same era—earned the 2008 Pulitzer Prize.