Book Review

William J. Stuntz, *The Collapse of American Criminal Justice*. Cambridge: Harvard University Press, 2011, pp. 413, $35.00.

Reviewed by Andrea Roth

Introduction

One of the better ways to celebrate next year's fiftieth anniversary of *Gideon v. Wainwright*,[1] in which the Supreme Court held that poor defendants accused of felonies in state court are constitutionally entitled to appointed counsel, would be to force every lawmaker, judge, prosecutor, and defense attorney in the United States to read the last major work of a man who believed the legacy of *Gideon* is not an unequivocally positive one. In *The Collapse of American Criminal Justice*, the late Bill Stuntz argues that the cure for the pathologies of the criminal justice system lies in restoring local democratic control over crime policy, better funding public defenders, and buttressing equal protection doctrine, rather than in the continued focus on the "vast network of procedural rules the Supreme Court has crafted since the early 1960s" (302). Stuntz argues that the fetishization of so many formalistic procedures that, in his view, at best indirectly ensure fairness of trial and sentencing outcomes has rendered trials too expensive, which in turn has driven prosecutors and lawmakers to seek ways to avoid trial and force pleas through draconian sentencing schemes, a skewed focus on easily detected urban drug crimes mostly committed by racial minorities, and ever-expanding substantive criminal law. The result of this assembly-line justice, Stuntz argues, is both excessive punitiveness in the form of racially disparate mass incarceration and excessive leniency in the form of underprosecuted violent crime in poor communities.

Stuntz humbly admonishes that he is neither an empiricist nor an historian,[2] and it is true that many of his causal claims start with phrases like "It seems more than a coincidence that . . . ." Moreover, other recent scholarship

Andrea Roth is Assistant Professor of Law at UC Berkeley School of Law. Many thanks to David Sklansky, Ty Alper, Eliza Hersh, Saira Mohamed, and John Paul Reichmuth for their thoughtful advice.

1. 372 U.S. 335 (1963).

2. Stuntz's humility is legendary. As a student in his criminal procedure class, I recall him politely but with good humor requesting on the last day that we dispense with the tradition of clapping for one's professors as if they were demigods, "bounding gazelle-like from the classroom."

seems to call into question Stuntz's claims about prosecutors' focus on drug crimes to the detriment of violent crime clearance rates,[3] and the impact of excessive sentencing on incarceration rates.[4] Nevertheless, Stuntz's origin story and reform proposals make intuitive sense and seem to square with the realities of modern criminal practice. In any event, the power of the book is not as a definitive statement of cause-and-effect followed by a comprehensive prescriptive agenda, but rather as a moral challenge to the rest of us to continue the conversation after he is gone.

In the pages that follow, I hope to accomplish two goals. First, I briefly describe Stuntz's descriptive claims and proposals for reform, trying to point out some of what makes it so powerful but also raising a few doubts and qualifications. One of those qualifications is that Stuntz's primary arguments are very much anchored in a world that is gradually disappearing: a world in which scientific evidence plays a minor role, at most, in criminal prosecutions. My second goal, accordingly, is to examine how Stuntz's arguments play out in a new world in which complex scientific evidence such as DNA testing is becoming increasingly central to criminal adjudication. That world is briefly mentioned but little explored in Stuntz's book, but it turns out that his largest themes—in particular the need to focus on providing defendants with procedural protections that are substantively meaningful in challenging this new form of proof and that take innocence seriously—will be as important in that world as in the one Stuntz describes.

How Did We Get Here?

Anyone who has listened to NPR recently is likely aware that America has the highest rates of incarceration in the world, that our population of prisoners is grossly skewed in terms of race and class, and that our imprisonment rates have increased even as national crime rates have dropped over the last 20 years. What is less well known, if Stuntz's claims are right, is that we are also in a period of excessive leniency in which violent crime is underprosecuted in poor urban communities, that our system is rigged to coerce guilty pleas with high average sentences from both factually innocent and guilty defendants, and that the very definition of factual guilt has expanded over the years in a way that is profoundly antidemocratic.

Outside the insular worlds of academia and the criminal defense bar, many find it difficult to believe that a factually innocent person would plead guilty.

3. For example, only about 20 percent of offenders in 2006 were in prison for drug crimes. James Forman Jr., Racial Critiques of Mass Incarceration: Beyond the New Jim Crow, 87 N.Y.U. L. Rev. 21, 46–47 (2012). Meanwhile, huge racial disparities exist in violent crime prosecution rates, *id.*, which would suggest that violent crime in poor communities is prosecuted quite often, assuming that violent crime is mostly intraracial.

4. *See* John Pfaff, The Causes of Growth in Prison Admissions and Populations, at 18, *available at* http://ssrn.com/abstract=1990508 (Jan. 23, 2012) (determining from previously unreviewed data that a large increase in felony filings per arrest, rather than factors such as number of arrests or length of sentence per admission, is primarily responsible for the increase in incarceration from 1980 to the present).

Stuntz's account is both comforting and disturbing in that it will hopefully reveal to all—including non-lawyers, who will find the book fascinating and eminently readable—why it would be absurd to assume otherwise. Defendants often are told that if they do not accept a plea deal, they will be charged with numerous overlapping state and/or federal offenses carrying draconian maximum penalties, mandatory minimums, habitual offender enhancements, or profound collateral consequences such as lifetime sex offender registration or deportation. While the defendant has a theoretical right to take the case to trial, his lawyer might advise him that his chances of winning are slim, or cannot be adequately assessed by the time the plea deal expires. Prosecutors often set plea deadlines early, sometimes even before the preliminary hearing or indictment, rendering nearly impossible a full factual investigation by counsel of the charges and state's proof before advising the client on the chances of winning at trial. These concerns are heightened for the vast majority of defendants who are indigent; appointed counsel's allocation of time to factual investigation rather than other types of advocacy is often skewed by a crushing caseload in the hundreds and, in some jurisdictions, a fee structure that pays by the case rather than the hour.[5]

Even with respect to defendants who are factually guilty of *some* crime, harsh sentencing schemes, overcharging, and expansive substantive law ensure that plea deals often end in disproportionate sentences determined unilaterally by prosecutors. Moreover, the behavior that counts as "factual guilt" has been dramatically expanded under modern substantive criminal law. As Stuntz points out, vaguer common-law definitions of crimes, which left significant discretion to juries in determining what type of conduct is wrongful, have given way to precisely defined statutory offenses that leave little room for jury discretion.

Stuntz notes that in the Gilded Age, crime and imprisonment rates were both very low and relatively stable (17, 133). What changed, and why? To summarize Stuntz's major theses in a paragraph is difficult given the epic nature of the historical account he offers, which begins with the French Revolution and continues through Reagan's War on Drugs. But four key links in the chain are that (1) Warren-Era decisions have rendered trials much more expensive; (2) the high cost of trials, the high crime rate of the 1960s–1970s, and the perception that courts were too protective of guilty defendants created a perfect storm driving lawmakers and prosecutors to pursue measures intended to make convictions cheaper and easier, such as high sentences and broader definitions of crimes; (3) the racial disparity in incarceration is largely due both to discrimination, which continues unabated under current ineffectual equal protection law, and to a law enforcement focus on cheap and easy urban drug prosecutions as a proxy for more difficult violent crime prosecutions; and (4) the minorities most affected today by the instabilities in current crime

5. *See, e.g.*, National Legal Aid and Defender Association, In Defense of Public Access to Justice (2004) at 30, *available at* http://www.nlada.org/Defender/Defender_Evaluation/la_eval.pdf.

and imprisonment rates lack political capital, unlike the wave of European immigrants who became part of the political mainstream in the early 20th century and defeated American's previous and more transparent war on drugs, Prohibition.

A Way Out?

While the book's title portends a depressing story of systemic failure, the ultimate thrust of the book is hopeful. Stuntz proposes a mix of political and doctrinal changes that would work symbiotically to produce low violent crime rates and humane law enforcement policies. While I question the scope and efficacy of some of his solutions, it is difficult to argue with the central thesis of the book that a greater focus on substantive justice and democracy will be an important part of any successful reform effort.

On the democracy front, Stuntz suggests that we shift decision-making over prison funding to the urban communities most affected by mass incarceration, and decision-making over police funding to the state and county actors who tend to be more punitive. The goal is decreased reliance on prisons and increased reliance on policing, a change Stuntz shows is proven to reduce crime. The shift should also, he predicts, render sentencing reform more politically feasible. Stuntz further suggests increasing funding to public defender offices to allow them to spend more time on factual investigation and not focus their limited time primarily on filing boilerplate motions to enforce procedural rights.[6]

Stunz also proposes enhancing juror diversity by drawing jury pools from city rather than county demographics and eliminating peremptory strikes, arguing that such measures would be more effective than relying on defense counsel to litigate difficult-to-prove claims of racial bias in the selection process. Yet even if jury pools in a highly diverse city like Oakland, California were city-based rather than county-based, they would be disproportionately white because of strict jury exclusion laws that disproportionately affect minority jurors. Any attempt to increase juror diversity must also address disenfranchisement laws.[7]

It is tempting to be pessimistic about whether such political reforms are remotely realistic, given the account of some scholars that those in power

6. Of course, increased funding will not stop counsel from filing motions; so long as a procedural right is recognized and arguably violated, they have a constitutional and professional obligation to do so. *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365 (1986) (deeming failure to file a meritorious motion to suppress deficient performance for "ineffective assistance of counsel" purposes).

7. In Alameda County (which includes Oakland), first-time felony crack cocaine convictions for personal possession, unlike those for powder cocaine or methamphetamine, result in the citizen's lifetime exclusion from jury service absent the granting of a "Certificate of Rehabilitation," which requires, among other things, proof of seven years of rehabilitation. See Cal. Penal Code §§ 4852.01-03.

cling to crime policy as a tool of social control[8] or racial subjugation,[9] and the fact that sentencing reform has failed even in majority-minority cities like Washington, D.C.[10] But perhaps there is also room for optimism. New York's strict Rockefeller drug laws, notably passed with the support of many African American leaders,[11] were repealed in 1994, and as Stuntz discusses at length, Prohibition failed in spite of—indeed, perhaps because of[12]—its potential as a means of targeting immigrant populations.

On the doctrinal front, Stuntz first suggests a return to vaguer common-law language to describe various crimes, and calls for courts to "reestablish" the concept of *mens rea* (303). Yet such small steps, even if politically feasible, would have limited effect if a jurisdiction kept other expansive and commonly invoked doctrines such as the felony murder rule, which imposes nearly strict liability on felons for killings during the course of and in furtherance of the felony, and so-called *Pinkerton* liability, which imposes nearly strict liability on all co-conspirators for foreseeable acts of other conspirators in furtherance of the conspiracy.[13] Perhaps Stuntz would view these doctrines as non-pathological because, though punitive and contrary to traditional *mens rea* requirements, they might not be the product of hasty, undemocratic attempts to enable cheap and easy prosecutions for the sake of avoiding trials.

The second, and more controversial, doctrinal reform Stuntz suggests is to ensure just trial and sentencing outcomes through equal protection and substantive due process doctrine rather than more indirectly through enforcement of the procedural guarantees of the Fourth, Fifth, and Sixth Amendments. Stuntz acknowledges that "the undoing of" Warren Era decisions is an unrealistic goal (302). Even if such an "undoing" were possible, it surely would not increase the number of trials so long as severe sentencing and easily proven crimes remain on the books. Prosecutors, many of whom receive merit increases based on conviction rates,[14] would still have an incentive to encourage pleas and to avoid a possible loss at trial by overcharging or threatening lengthy prison time. Instead, Stuntz suggests that courts shift their focus to facilitating equal protection arguments against discriminatory

8. *See, e.g.*, Jonathan Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear (Oxford Univ. Press 2007).

9. *See, e.g.*, Michelle Alexander, The New Jim Crow (New Press 2010).

10. *See* James Forman Jr., *supra* note 3, at 47.

11. *See id.*

12. *See* William J. Stuntz, Unequal Justice, 121 Harv. L. Rev. 1969, 2024 (2008) ("Politicians and judges alike worried obsessively about the chronically inconsistent enforcement of the Eighteenth Amendment, and about what those enforcement patterns said about the rule of law in America.").

13. *See* Pinkerton v. United States, 328 U.S. 640 (1946).

14. *See, e.g.*, Jessica Fender, DA Chambers offers bonuses for prosecutors who hit conviction targets, Denver Post, Mar. 23, 2011, *available at* http://www.denverpost.com/news/ci_17686874.

and coercive law enforcement tactics. Under current law, selective prosecution claims and other fairness-based arguments are often dead losers because defendants do not have enough data to be entitled to a hearing, but need to have a hearing to discover the data.

To end this "legal Catch-22" (120), Stuntz suggests forcing jurisdictions to keep data relevant to such claims. If the defendant in *Bordenkircher v. Hayes*[15] had access to comprehensive sentencing statistics listing the offense, underlying facts of offense, and race of offender, he could have argued that the prosecutor's use of a habitual offender statute to threaten life in prison for an $88 forged check, a strategy employed solely to force a five-year plea deal, was illegal given that no other defendants faced a similar sentence on such facts. In drug prosecutions, defendants could argue that their overly harsh plea deals do not match their drug crimes and are proof of pretextual motive (301). In the coerced confession context, "a requirement that interrogation sessions be taped so that judges could see (or at least hear) for themselves how the relevant actors behaved" (212) would deter abusive tactics and make it easier to prove involuntary confessions violative of due process (all without relying on *Miranda* doctrine, which according to Stuntz perversely provides legal cover for coercive tactics and rewards only sophisticated suspects).

Similarly, in *Duncan v. Louisiana*,[16] teenager Gary Duncan might have proven that had he been white, he never would have been prosecuted in 1966 for the two-year offense of simple battery based on an alleged "slap" of a white youth who was harassing Duncan's 12-year old cousins for attending a recently desegregated school. Stuntz points out that it was the racist prosecution in *Duncan* that seems most unjust, and not so much the procedural error for which the case is most famous: the denial of a jury trial for a non-petty offense. Indeed, the reversal on that ground is not what ultimately saved Duncan; before his trial on remand, the legislature capped the sentence for battery at six months, which would have made his second trial a bench trial as well.[17]

Two doubts might be raised, however, about Stuntz's attack on the Warren Court and embrace of equal protection doctrine. First, while Stuntz is surely right, as he has argued in previous work, that "[p]rocedural regulation inevitably encourages substantive overreaching,"[18] such overreaching might also occur in response to changes he suggests. It might first come in the form

15. 434 U.S. 357 (1978).

16. 391 U.S. 145 (1968).

17. After remand, a federal district court enjoined the prosecution on grounds that the state's case was brought in "bad faith" and for the purpose of "harassment." Duncan v. Perez, 445 F.2d 557 (5th Cir. 1971). Stuntz laments that "no body of law arose from the [later] decision" (369 n.72).

18. William J. Stuntz, The Political Constitution of Criminal Justice, 119 Harv. L. Rev. 780, 819 (2006). Interestingly, Stuntz does not point to widespread substantive overreaching in the federal system before the 1970s, even though the Bill of Rights has been binding in federal prosecutions since the Founding.

of perjured testimony. After *Mapp v. Ohio*[19] made the exclusionary rule binding on states, the number of "dropsy" cases in which police claimed to have seen defendants throw what looked to be drugs or weapons from their person significantly rose.[20] Similarly, if Gary Duncan's primary remedy were to stem from showing through data that officials would not have brought the case on such facts had he been white, officials might be tempted to embellish the facts beyond a mere slap. In the confession context, police might be tempted to coerce confessions before taping begins, then have suspects repeat their words on tape.[21] Overreaching could also come in the form of "leveling up." In a case like *Bordenkircher*, under a more robust equal protection regime, officials might be tempted to start charging more defendants under the habitual offender law to foreclose claims that such prosecutions are unusual. And in drug cases, officials might pursue higher drug sentences across the board to rebut a charge that a high sentence suggests that the prosecution is a pretextual substitute for a more difficult violent crime prosecution.

Second, recognizing (as Stuntz does) that certain basic procedural rights such as the right to jury, counsel, and protection against coerced confessions are likely necessary to preclude wrongful convictions (81), it is not clear why the Warren Court was wrong to interpret them as binding on the States. While an all-white jury in Louisiana's notorious Plaquemines Parish in 1966 may well have convicted Duncan anyway, a fairly selected jury might have acquitted, or at least would have been more likely to acquit than a judge beholden to segregationist officials. The legislature's desperation to reduce the maximum sentence immediately before Duncan's remand suggests as much. But that premise seems to suggest that *Duncan* was not necessarily wrongly decided, other than its overly narrow grounds. While reasonable people might disagree about the legitimacy of incorporation via the Fourteenth Amendment's Due Process Clause,[22] that broader debate is not one that Stuntz directly invokes.

Ensuring Substantive Justice in an Era of Science-Based Prosecutions

Stuntz briefly gives a nod to the coming era of science-based prosecutions, describing "the increasing range and accuracy of forensic evidence, including DNA" as "the greatest advance in criminal procedure of the past generation" (227). To be sure, DNA testing promises to dramatically enhance both systemic accuracy and crime clearance rates, although its potential to do the latter is hampered by testing backlogs and the perverse policy of many state

19. 367 U.S. 643 (1961).

20. *See, e.g.*, Sarah Barlow, Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960–62, 4 Crim. L. Bull. 549, 549–50 (1968) (noting that "dropsy" testimony was much more prevalent after Mapp).

21. While a "question-first, warn-later" strategy might be illegal under *Miranda*, *see* Missouri v. Seibert, 542 U.S. 600 (2004) (Kennedy, J., concurring), judges might view the second confession—assuming they knew about it—voluntary under a "totality of circumstances" due process test.

22. *See, e.g.*, McDonald v. Chicago, 130 S. Ct. 3020, 3058–88 (2010) (Thomas, J., concurring).

laboratories to prioritize testing based on when a case is up for trial, rather than the seriousness of the offense.[23] But a reported DNA match may still be unreliable evidence of guilt in any given case, based on interpretive error, contamination, faulty statistics, or reasons for innocent presence such as DNA "transfer."[24] At the same time, DNA's perceived infallibility and complexity make it more difficult to uncover such errors through investigation and trial challenges. Unlike eyewitnesses, for example, DNA results do not break down under cross-examination, and jurors have trouble assessing the results' probative value, which is typically a function of complex statistical analysis.

Meanwhile, lesser forensic methods of dubious reliability are still admitted against defendants. A scathing 2009 report by the National Academy of Sciences concluded that several routinely used forensic methods, including latent fingerprint analysis, are lacking in basic validation as a tool for reliably identifying suspects.[25] The report noted that most methods other than DNA testing were developed solely for law enforcement purposes, and have not been meaningfully scrutinized by the broader scientific community.[26] The report suggested that courts have too leniently admitted such methods under the so-called "*Frye*" test,[27] which asks not whether the science is actually reliable, but simply whether there is "consensus" in the relevant scientific community about its reliability. Not surprisingly, the Innocence Project reports that faulty forensic methods contributed to wrongful convictions in over 50 percent of reported DNA exonerations.[28]

While Stuntz mentions scientific evidence only in passing, his call for a greater focus not on specific, formalized procedures for their own sake but on meaningful procedures that ensure substantive justice is equally as critical in an era of DNA as it was for Gary Duncan in 1960's Louisiana. Take first the fact that courts are still admitting unvalidated forensic methods, and the

23. Thus, perversely, DNA testing in many jurisdictions is used more for confirmation of an existing suspect in drug and property crimes rather than to investigate unsolved rapes and homicides. *See* Andrea L. Roth, Database-Driven Investigations: The Promise–and Peril–of Using Forensics To Solve "No-Suspect" Cases, 9 Criminology & Pub. Pol'y 421, 421–22 (2010) (citing Kevin J. Strom & Matthew J. Hickman, Unanalyzed Evidence in Law Enforcement Agencies: A National Examination of Forensic Processing in Policing Departments, 9 Criminology & Pub. Pol'y 381 (2010)).

24. *See, e.g.*, Erin E. Murphy, The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in DNA Typing, 58 Emory L.J. 489 (2008); William C. Thompson, Tarnish on the 'Gold Standard': Understanding Recent Problems in Forensic DNA Testing, The Champion (Jan./Feb. 2006), *available at* http://www.newkirkcenter.uci.edu/Thompson/Tarnish.pdf.

25. *See* National Research Council, National Academy of Sciences. Strengthening Forensic Science in the United States: A Path Forward (National Academy Press 2009).

26. *Id.* at 183–84.

27. *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

28. *See* http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php.

Frye test—still followed in a significant number of states[29]—is not an effective filter. Heeding Stuntz's call to interpret the Due Process Clause in a way that focuses on outcome accuracy and protecting innocent defendants, one solution might be to recognize a basic due process right not to be convicted based on unreliable scientific evidence, i.e., to "constitutionalize" the reliability-based admissibility standard for expert testimony set forth in *Daubert v. Merrill-Dow Pharmaceuticals*.[30]

On the other hand, when it comes to DNA testing, a method in which the science is generally well-validated but where case-specific errors are possible and difficult to detect, protection against "unreliable" pseudo-science is not sufficient. What an innocent defendant needs to meaningfully challenge faulty DNA testing and other seemingly hyper-reliable but still fallible "second-generation" forensic methods[31] is an attorney who understands enough about the potential errors to consult an expert; money to hire experts; money and access to biological material to facilitate possible testing or retesting; access to the government's procedures, analysts, and statistical databases to be able to assess the accuracy of the testing results and match statistics;[32] and a factfinder who will understand the probative value (or lack thereof) of the test results and the defense's attacks on those results.

Here, Stuntz's wariness of "freezing [specific] procedures in place" (79) at the expense of more directly protecting the substantive rights ostensibly served by those frozen procedures is validated yet again. With respect to confrontation, Stuntz notes that current law contemplates live testimony rather than scientific evidence. He specifically targets *Melendez-Diaz v. Massachusetts*,[33] in which the Court held that the state, upon a defendant's request, must introduce drug analysis reports through the live testimony of the chemists who authored the reports, rather than simply admitting such reports under a hearsay exception. The decision was a follow-up to *Crawford v. Washington*,[34] in which the Court held that confrontation is a categorical procedural right applicable to all "testimonial" hearsay, rather than a more flexible right to confront evidence

29. At least 13 states still follow *Frye*, and another four have a hybrid standard that does not fully embrace the reliability-based test of Daubert v. Merrill-Dow Pharmaceuticals, 509 U.S. 579 (1993). *See* Kenneth W. Waterway & Robert C. Weill, A Plea for Legislative Reform: The Adoption of Daubert To Ensure the Reliability of Expert Evidence in Florida Courts, 36 Nova L. Rev. 1, 25 (2011).

30. *See, e.g.*, Erica Beecher-Monas, The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process, 60 Wash. & Lee L. Rev. 353, 360 (2003) (calling for constitutionalization of *Daubert* in death penalty sentencings).

31. *See* Erin E. Murphy, The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence, 95 Cal. L. Rev. 721 (2007).

32. The FBI currently refuses, for example, to allow researchers access to anonymized profiles in the national DNA database to test the accuracy of the FBI's purported match statistics. *See* Dan Krane et al., Time for DNA Disclosure, 326 Science 1631–32 (2009).

33. 557 U.S. 305 (2009).

34. 541 U.S 36 (2004).

deemed potentially untrustworthy. Stuntz argues that *Melendez-Diaz* actually "undermines" the advance of science (227): if chemists are spending their time testifying for the sake of a likely uneventful cross-examination rather than conducting analyses that would solve cases, innocent suspects and crime victims ultimately suffer.

While there are reasons to believe this particular concern is unfounded,[35] Stuntz's broader point is well taken that courts' exclusive focus on cross-examination has obscured the rationale underlying the right of confrontation. But the answer need not be to view the right as trivial in the modern age, or to return to the pre-*Crawford* standard that treated the existence of the right as turning on the perceived trustworthiness of the evidence. Indeed, it is the very fact that DNA testing results are assumed to be so trustworthy, but may well not be, that make them resistant to challenge except through investigation by a zealous advocate for the defense. Rather, the answer should be for courts to recognize that the right of confrontation is not historically or logically limited to cross-examination and physical confrontation, but—as David Sklansky has suggested—encompasses "the broader ability of an accused to test and to challenge the state's proof."[36] Correctly viewed as such, the confrontation right would entitle a defendant to the type of access to government-controlled data and material needed to meaningfully investigate DNA testing results.

In the same respect, the right to jury—if interpreted merely as a right to a venire of impartial citizens from a fair cross-section of the population—may be cold comfort for a defendant whose rebuttal of the state's proffered forensic evidence requires some level of scientific competence on the part of the factfinder to understand or credit. Scott Brewer has written of a possible "intellectual due process" norm—that is, a requirement that "factfinding regarding matters that are the special epistemic province of expert scientists, must be conducted in a coherent and rational manner."[37] Perhaps the Due Process Clause should be interpreted to allow a criminal defendant to insist upon a scientifically trained factfinder or trial by judge rather than jury[38] where necessary to ensure a nonarbitrary verdict.

35. For example, California and Illinois required live testimony from chemists long before the Court required it, and the cost of drug trials did not skyrocket. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), Reply Brief for Petitioner Luis E. Melendez-Diaz 27-28, *available at* http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_07_591_PetitionerReply.authcheckdam.pdf. One reason is that defendants often waive the right; after all, the government's case generally becomes more persuasive when the jury hears from a live scientist rather than a hearsay report.

36. David Alan Sklansky, Hearsay's Last Hurrah, Sup. Ct. Rev. 1, 67, 71–72 (2009).

37. *See* Scott Brewer, Scientific Expert Testimony and Intellectual Due Process, 107 Yale L.J. 1535, 1676 (1998).

38. The Supreme Court has thus far upheld as constitutional the requirement that defendants secure permission from the government before insisting upon a bench trial. Singer v. United States, 380 U.S. 24 (1965).

Finally, the right to counsel—if interpreted merely as a right to an appointed attorney—means little without low enough caseloads and appropriate fee structures to facilitate spending time on forensic investigation, as well as adequate funding to allow meaningful training, hiring of experts without undue resistance from judges protecting tight court budgets, and testing or retesting of forensic material as needed. Stuntz suggests that courts, rather than setting specific "budget lines" (299), provide incentives for state legislatures to create their own funding solutions. This suggestion seems reasonable, so long as legislatures take into account the particular pressures on indigent defense counsel created by the influx of complex scientific evidence in criminal trials.

In the end, Stuntz's call for more substantive justice, democracy, and mercy is well reasoned, well timed, and, one hopes, will be well received by those with the power to enact change. In his essay "Law and Grace" written shortly before he died, Stuntz writes that we, like Dr. Martin Luther King, should "fight for the chance to embrace" our enemies.[39] The lessons of *The Collapse of American Criminal Justice*—in teaching that we all have more in common than we imagine, are all guiltier than we imagine for the injustice that surrounds us, and are all capable of doing better—give us little moral excuse to do otherwise. As Stuntz would say, "both sides are us" (312).

39. William J. Stuntz, Law and Grace, 98 Va. L. Rev. 367, 384 (2012).