

AN EMOTIONAL AFFAIR

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This essay briefly reflects on the seminal Article by William Stuntz, The Pathological Politics of Criminal Law. As Stuntz rightly argues, the pathology which afflicts our criminal justice system lies in its structural politics and power – unlike other institutional bodies, criminal justice can deprive liberty. But the power of the criminal code also lies in its inherent emotional attachment to the people it governs. Most folks rarely concern themselves with the various obtuse regulations which embody our modern legal system- yet almost everyone has a strong notion of how crimes should be punished. Criminal justice policy, however, has steadily tread towards sentencing decisions insulated from participatory influences. Likewise, punishment is now almost entirely a private enterprise. This divorce of the public from the ultimate output of the criminal justice system just might explain some of perverse realities which Stuntz so skillfully describes.

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Bill Stuntz potently dissects the afflicted state of our modern criminal justice system. As he suggests, the structure consists of entities – the prosecutor, the judiciary, and the legislature – which possess goals - often shared and opposed to one another. These goals are often political ones more than institutional objectives. This is hardly surprising given the power which accompanies a system that has the ability to severely restrict individual liberty. But the power of the criminal code lies in another entity often forsaken in formal analysis: the public's emotional bond with the code.

Criminal law is powerful indeed because of its ability to sanction and do so severely. Yet its power also lies in its ability to connect with every person it governs. Many may not know of the logic or intricacies of the tax code or tort law; but almost everyone inherently understands the basic objective of the criminal code in its simplest form. As Stuntz rightly points out, much of the crimes punished today were outlawed in Blackstone's day.² This is at least partly so because criminal law touches upon behaviors the public inherently abhors whether they are violence, deceit, or treason. Those behaviors have a long history of striking at the emotional core of what happens when a social contract is violated among a civilized people. In this sense, the criminal code represents a public discourse of what behaviors are considered intolerable both to the social structure of public life and homeostasis of individual psychological welfare. Under this lens, punishment is a necessary cathartic exercise not only for society at large, but also for the individual citizen – it restores the contract in a sense.

Inasmuch as the criminal code joins generations past and present through a common emotional bond of prescriptive behavior, the current code is much divorced from this bond in its modern institutional operation. The breadth and depth which Stuntz describes does indeed lead to a system which relies mostly on informal adjudication. That pernicious growth has consequences which many scholars have eloquently described, but an additional outcome also warrants attention: The modern system is remarkable in its emotionless day to day operation and mechanical output which leads to a displacement of the public's emotional input into criminal law. As the criminal code grows and institutional realities mandate more informal adjudication mainly outside of the public purview, the public seeks new ways to influence this most primal process of rule by law. As publicized

² William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. Law Rev. 505, 512 (2001)

jury trials wane, the demand for tougher criminal legislation grows. To put it another way: as the process of criminal adjudication becomes less of an emotional enterprise *en mass*, the public seeks alternative ways to redress its affective need for input into criminal law and adjudication. Legislation becomes an easy outlet for this need; and it is easy for all of the entities involved. It is the path of least resistance because it is the most politically approachable and feasible. Calls for adding more crimes to the code is systematically easier (and cheaper) than taking more cases to trial.

But what of this change in the political interplay between the public and its criminal justice system? After all, change is inevitable and often for the good. Few would argue for a return to the criminal adjudication landscape populated by trial by ordeal, whipping posts, and the pillory. One upshot is the changing morphology of *substantive* criminal law which becomes broad and deep because *it* is emotive itself. As informal adjudication moves the public eye away from determinations of culpability, these collective emotions focus on punishment instead. That is to say, as the *process* becomes increasingly private and excludes the public's judgments of wrongfulness by diminution of, say, jury trials, than the collective desire for input into the criminal code naturally falls onto the other end: defining the crimes and their punishments. The emotional fodder for legislating more behavior as crimes easily accumulates.

One retort to this transition may be that the criminal justice system is merely maintaining its emotional homeostasis – the substantive law picks up when procedure and adjudication excludes. Yet the focus is misplaced insofar as the emotion at play is mismatched with its goal. If criminal culpability is really about individual behavior and accountability – as the popular perception claims it is – than the emotional emphasis lies with the criminal process of deciding guilt and innocence and not such much on the accretion of criminal statutes. The divorce of the public - and its emotions - from the process of adjudication is an ominous malignancy of the pathological politics of criminal law.
