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978-1-107-01941-6 - The Political Heart of Criminal Procedure: Essays on Themes of William J. Stuntz

Edited by Michael Klarman, David Skeel and Carol Steiker

Excerpt

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Introduction: Appreciating Bill Stuntz

Michael Klarman, David Skeel, and Carol Steiker

In the fall of 2009, we started planning a conference at Harvard Law School to celebrate the life and scholarly achievements of Bill Stuntz. Had it been up to Bill, this celebration never would have happened. “I feel uncomfortable about this,” he emailed one of us. “It all seems to me undeserved – I’m not at that level – and I would think no one would be interested in writing for or publishing it.”

Although characteristically modest, Bill was obviously wrong about his stature within the legal academy, where he is widely esteemed as the preeminent criminal procedure scholar of his generation. “Of course I’ll be there,” one leading scholar replied to our invitation. Every other invitee likewise accepted – quickly and enthusiastically, even when attendance required rearranging prior commitments.

Bill had another concern about the conference – one that the three of us shared. When conference planning began, Bill was already well into his second year of a Stage 4 cancer diagnosis; the prognosis was bleak. Neither he nor we wanted a funereal conference, with dark suits, long faces, and mournful tributes. Yes, we wanted space for fond recollections from mentors, colleagues, students, and friends,¹ but the heart of the conference that we envisioned would consist of scholarly explorations of Bill’s work, its influence, and its relevance to modern criminal justice. We asked leaders in the field to contribute written essays, and the work they submitted turned out to be even more remarkable than we had imagined.

¹ See “A Celebration in Honor of William J. Stuntz,” Harvard Law School, March 26–27, 2010, Web cast of fourth session, available at <http://www.law.harvard.edu/faculty/wstuntz/>.

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We present these essays here as our collective tribute to our extraordinary colleague and friend, the late Bill Stuntz.

Stuntz began his teaching career at the University of Virginia School of Law in the fall of 1986, just two years after graduating from that same institution. Bill's initial overture to the law school had been, shall we say, inauspicious: His student application was rejected. Undeterred, he and his wife Ruth moved to Charlottesville anyway, and Stuntz worked for a year as a clerk at a local inn. Having established state residency, Stuntz reapplied and was admitted. Three years later, he graduated first in his class with numerous prizes, and went on to prestigious clerkships, first in Philadelphia with U.S. District Court Judge Louis Pollak, former dean of the Yale and University of Pennsylvania law schools, and then with Supreme Court Justice Lewis Powell.

When Bill returned to Virginia as an assistant professor in 1986, his new colleagues wondered what subject he would choose as his specialty. Robert Scott – one of Stuntz's law school mentors and later his dean – lobbied hard for Bill to follow his footsteps into commercial law, a field with a distinguished history that was entering a particularly vibrant phase owing to the advent of the law-and-economics movement. Had he chosen this path, there is no doubt that Stuntz would have quickly become a star.

Instead, much to Scott's chagrin, Stuntz chose to cast his lot with criminal procedure, a field that many considered moribund. The Warren Court had revolutionized the law of criminal procedure in the 1960s, with decisions such as *Mapp v. Ohio* (1961), (applying to the states the exclusionary rule for illegally seized evidence); *Gideon v. Wainwright* (1963); (requiring states to provide free counsel to indigent defendants in all serious criminal cases); and *Miranda v. Arizona* (1966); (interpreting the Fifth Amendment to require police to provide the famous warnings to criminal suspects in their custody and to respect any invocation of the right to remain silent). Criminal procedure scholars had helped lead and shape that revolution.

However, public backlash against rising crime rates and President Nixon's reconstitution of the Supreme Court had brought the criminal procedure revolution to a crashing halt around 1970. Over the next two decades, scholarship in the field languished as law reviews published endless liberal lamentations over the latest Burger Court retrenchment. The time seemed unpropitious for a talented young scholar to launch a career in this field. Ron Allen, later Bill's coauthor on a leading criminal

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procedure casebook, remembers telling Stuntz that becoming a criminal procedure scholar was sure to “kill brain cells.”

Nobody would make such a claim about criminal procedure – or, more generally, criminal justice – scholarship today. The field has been dramatically reinvigorated and transformed – in large part owing to the work, and the influence, of William J. Stuntz.

Stuntz made his scholarly debut with *Self-Incrimination and Excuse*,² an article that explored the poor fit between Fifth Amendment case law and privacy and autonomy – the values that were said to animate self-incrimination doctrine. For example, the Supreme Court had held that, despite the impairment of privacy and autonomy, law enforcement officials were permitted to require criminal defendants to provide blood samples and to identify themselves at the scene of an accident. Stuntz offered a novel alternative account of the privilege against self-incrimination by analogizing it to criminal law’s doctrine of excuse: Just as the criminal justice system partially excuses defendants for behavior committed under duress – not because that behavior is right but because it is understandable – so does it recognize that defendants put to the choice of lying, being jailed for contempt for refusing to testify, or incriminating themselves by telling the truth are unlikely to play the part of heroes. Stuntz argued that this excuse-based understanding of the privilege made sense of many otherwise inexplicable aspects of the doctrine such as waiver, use immunity, and required production of documents.

In his second major article, *Waiving Rights in Criminal Procedure*,³ Stuntz examined the seeming tension between the broad array of robust rights protected by the Supreme Court under the Fourth, Fifth, and Sixth Amendments and the apparent ease with which the Court permitted those rights to be waived through defendants’ ignorance and even police deception. Stuntz rejected the conventional explanation that the Warren Court’s successors were simply undermining rights of which they disapproved through lenient waiver rules. Instead, he sought to reconcile the tension by noting that criminal procedure rights often protect the interests of people other than the rights holder. For example, Fourth Amendment protections against unreasonable searches and seizures are designed to safeguard the rights of innocent people, but when the protections are enforced by the exclusion of relevant evidence, criminals are rewarded. Stuntz argued that waiver doctrine reduced these windfall

² 88 COLUM. L. REV. 1227 (1988).³ 75 VA. L. REV. 761 (1989).

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benefits by permitting waivers of rights when third-party beneficiaries could be independently protected.

In another early article, Stuntz dissected the Fourth Amendment's warrant requirement.⁴ On its face, that requirement is puzzling: Legal standards are generally enforced post hoc for the obvious reason that ex ante reviews, most of which will subsequently prove to have been unnecessary, are expensive. Stuntz rejected the usual explanations for the warrant requirement – for example, he noted that although magistrates can provide “neutral” oversight, so can post hoc reviewing judges – and he offered three alternative accounts. First, in a system using monetary damages to redress illegal searches and seizures, a warrant requirement provides police officers with a safe harbor in order to avoid the overdeterrence of socially useful searches – a special problem given the difficulties of accurately valuing the intangible harms caused by illegal searches. Second, in a system that uses the exclusionary rule to enforce the Fourth Amendment, post hoc reviews of probable cause determinations inevitably bias the outcome because the judge knows that the police search uncovered evidence of criminal behavior. Forcing the police to demonstrate probable cause before the search avoids that bias. Finally, post hoc review encourages police perjury because details gleaned from the search can be used to buttress the case that probable cause existed ex ante. Stuntz suggested that disagreements among the Justices over the scope of the warrant requirement can be understood to turn on which concern – decision-maker bias or police perjury – is predominant.

In a 1992 article,⁵ Stuntz cast new light on a controversial line of decisions that relaxed usual Fourth Amendment standards for searches conducted by government officials unrelated to the gathering of evidence for criminal prosecutions. For example, school principals searching students' lockers and belongings, government hospital administrators searching physicians' office files, and probation officers searching the homes of their charges are all freed from the usual warrant and probable cause requirements. Many academic commentators criticized these decisions, and the Court itself offered no coherent explanation for them. In his usual counterintuitive fashion, Stuntz explained how these rulings actually *benefited* the class of persons whose rights were seemingly infringed. Because these

⁴ *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991).

⁵ *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553 (1992).

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administrative officials exercise broad control over the lives of the people whom they wish to search, restricting search authority might well lead the administrators to resort to even more intrusive measures. A principal who is not permitted to search lockers can simply eliminate them. Legislators denied the option of authorizing searches of probationers might abolish probation.

This early work displays many of the virtues that Stuntz aficionados would later come to celebrate. Although these articles are doctrinal and therefore, in some sense, conventional, they uncover novel patterns in familiar material, connect seemingly diverse fields, and evaluate legal doctrines at least partially on the basis of the incentives they create and the consequences they produce. In addition, for someone who never practiced criminal law – or any other sort of law, for that matter – Stuntz’s scholarship (and his teaching) were remarkably well grounded in the practical realities of day-to-day police work.

In the second phase of his scholarly career, Stuntz broadened his focus from discrete doctrinal issues to a systemic study of the complex, interacting mechanisms of criminal justice. His scholarship became more normative and less descriptive. Instead of simply explaining existing doctrine, he argued for a fundamental reorientation of large swaths of the law of criminal procedure. His work was strikingly nonideological and unpredictable. At one moment, he could sound like a Reagan conservative lambasting the Warren Court; at the next, he sounded like a Great Society liberal castigating race and wealth discrimination. Although his perspective was idiosyncratic and eclectic, it was united by a single, overarching theme: a powerful condemnation of the stark racial and class inequalities that mark the criminal justice system and of the political pathologies that produce these inequalities. His entry points into these critiques were the intersection between criminal procedure and criminal justice and a fresh study of the historical forces that shaped modern criminal procedure doctrines. Like all of Bill’s work, his scholarship during this “middle phase” is written with verve and passion. Unlike most legal scholars, though, Bill wrote in a conversational tone that was clear, remarkably free of jargon, and – astonishing but true – entertaining to read.

This phase of Stuntz’s work began with companion articles published in 1995, in which he used historical analysis to explain why contemporary criminal procedure doctrine was mistakenly focused on informational privacy rather than on other values such as personal autonomy.

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In *The Substantive Origins of Criminal Procedure*,⁶ Stuntz pointed out that landmark eighteenth-century British self-incrimination and search cases were concerned with curbing the government's ability to prosecute religious heretics and political dissenters, not run-of-the-mill criminals such as murderers and rapists. Procedural doctrines were used to accomplish the substantive ends of protecting free speech and free exercise of religion in an era and a society that lacked any analogue to the Bill of Rights' First Amendment. During the *Lochner* era, in the late nineteenth and early twentieth centuries, criminal procedure doctrines were again put to substantive use – as a tool to protect businesses such as railroads from government regulation. When *Lochner* was finally repudiated, this substantive orientation of criminal procedure was collateral damage. It was replaced by the modern obsession with informational privacy. Stuntz argued that this obsession made little sense and that criminal procedure doctrine ought to be reoriented toward the goal of preventing police violence.

Stuntz further developed these points in *Privacy's Problem and the Law of Criminal Procedure*.⁷ Here, Stuntz noted two oddities regarding privacy protection. First, in the criminal context police officers are often severely constrained in their ability to invade personal privacy. For example, they must have probable cause before they can require a car driver to open a glove compartment or a pedestrian to disclose the contents of a paper bag he or she is carrying. Yet, outside the criminal context, government officials routinely require individuals to disclose very private information – for example, on tax forms, where they are required to reveal their bank records and the objects of their charity. Second, although our criminal procedure regime forbids a police officer from, say, turning over a stereo to see its serial number when investigating bullets being fired through the ceiling of an apartment, it has almost nothing to say about the amount of coercion the officer can use against people while conducting that investigation. Criminal procedure would do well, Stuntz argued, to pay greater attention to what he regarded as the more serious problem of police coercion and violence.

In one of his most important articles, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, published in 1997,⁸

⁶ *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 393 (1995).

⁷ *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995).

⁸ *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L. J. 1 (1997).

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Stuntz showed how the criminal procedure revolution of the 1960s arguably redounded to the detriment of its intended beneficiaries: criminal defendants – especially innocent ones. Criminal justice is a system with interrelated parts: Court decisions expanding the constitutional rights of criminal defendants may lead other institutional actors to respond in perverse and unexpected ways. For example, legislatures responded to the explosion in criminal procedure protections by ratcheting up punishments and expanding the scope of criminal liability. These changes, in turn, allowed prosecutors to pressure more defendants into accepting guilty pleas. Legislatures also reduced funding for overburdened public defenders, thereby providing powerful new incentives for them to pursue plea bargains. When defense counsel did not immediately plead their clients guilty, the system in effect encouraged them to raise procedural issues, which could be pursued cheaply, rather than issues of guilt or innocence, which involved costly investigation and trials. The result was a decline in resources available for defendants who were factually innocent and an exacerbation of class disparities between affluent defendants who could afford to hire lawyers and poor defendants stuck with underfinanced public defenders. Finally, overcriminalization enhanced the risk of racial discrimination by expanding prosecutorial discretion.

Bill's growing concerns about race and class discrimination are evident in other work from this period. In 1998, Bill explained how the disparate punishments meted out to largely white cocaine users and largely black crack users were likely caused by systemic factors rather than individual racist acts.⁹ Street sales of crack in poor urban neighborhoods are cheaper to investigate than are private sales of powder cocaine in upscale suburban neighborhoods. In addition, urban drug crime has more devastating effects on local communities, partly because it is more likely to be violent and partly because these communities often are already teetering near the edge of collapse. Thus, it is rational for police and prosecutors pursuing drug trafficking to target open-air drug markets in poor, predominantly minority neighborhoods (much as they targeted prostitution and alcohol in an earlier era). Still, Stuntz worried that a system widely perceived to be racially biased could not maintain legitimacy in the minds of those who disproportionately bore its costs. Stuntz therefore argued for reducing the sentencing disparity between the use of crack and powder cocaine, using investigative techniques that targeted the collateral effects of drug

⁹ *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998).

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markets rather than the buyers and sellers themselves, and allocating more law enforcement resources to upscale drug markets.

In 1999 and 2000, Stuntz explored how Fourth and Fifth Amendment case law benefits the wealthy at the expense of the poor.¹⁰ The Supreme Court's Fourth Amendment doctrine affords far greater protection for wealthy suspects living in nice homes, working in private offices, and driving their own cars than it does for poorer suspects who use public transportation and hang out on the streets. By raising the costs to the police of searching more affluent suspects, Fourth Amendment doctrine inevitably shifted law enforcement attention to the poor. Thus, Stuntz argued, Fourth Amendment law was "in no small measure responsible for the drug war's enormous racial tilt."¹¹

Stuntz argued that the *Miranda* doctrine was similarly perverse. It provided a zone of protection for well-informed defendants – usually either the wealthy or criminal recidivists – "while unsophisticated suspects have very nearly no protection at all."¹² Because prosecutorial resources are scarce, any doctrine making it more expensive to prosecute one group – those who invoke their *Miranda* rights – makes it comparatively cheaper to prosecute another – those who waive them. Rather than inviting well-counseled suspects to avoid questioning, Stuntz urged the Court to limit coercive police interrogation practices.

These important scholarly contributions came in the midst of major changes in Stuntz's personal and professional life. In 1999, Bill wrenched his back while changing a flat tire, exacerbating a childhood injury and leaving him in excruciating pain for the remainder of his life. In 2000, he relocated with his family from Virginia to Harvard and transferred his baseball loyalties from the Baltimore Orioles to the Boston Red Sox. Bill quickly became an institutional leader at Harvard, as he had been at Virginia, serving regularly on appointments committees, mentoring junior faculty, and earning the admiration and affection of his colleagues. Then, in early 2008, he was diagnosed with cancer, which after multiple rounds of chemotherapy and several surgeries, eventually led to his death in March of 2011.

While these upheavals were going on in his personal life, Bill's criminal justice scholarship took on a still broader focus. During the last decade

¹⁰ *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 (1999); *Miranda's Mistake*, 99 MICH. L. REV. 975 (2000).

¹¹ 67 GEO. WASH. L. REV. at 1285. ¹² 99 MICH. L. REV. at 977.

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of his life, he turned his attention to the political economy of the criminal justice system and the pathological politics that produced it. His work also acquired a more empirical focus. Bill became an avid consumer of crime data and criminological research. (Anyone who dropped by Bill's office during this time would have been struck not only by the extraordinary state of disarray, which was typical of Bill, but also by the vast collection of volumes of the Department of Justice's *Sourcebook on Criminal Justice* and the FBI's *Uniform Crime Reports*.) Bill also began to apply his keen analytical insights to entirely new fields. He wrote about law and Christianity, politics, war and terrorism, the pain that characterized his daily life, and the cancer that ultimately ended it.

In a now classic 2001 article,¹³ Stuntz explained the phenomenon of overcriminalization as a product of institutional incentives rather than ideology or politics. Federal and state legislators have strong incentives to expand criminal liability. On the one hand, expansion deflects blame for the harm caused by the newly criminalized activities. On the other hand, when blameless defendants are caught in the expanding net of criminal liability, legislators can blame overzealous prosecutors for abusing their discretion. One might suppose that, for just this reason, prosecutors would resist this expansion, but in fact they too argue for it because it eases their task of proving cases and inducing guilty pleas. Few interest groups oppose this united front. After all, no one wants to be accused of lobbying for criminals.

The result of this web of institutional incentives is a "pathological" system of bloated criminal liability and vast prosecutorial discretion. Judges, whose institutional and cultural incentives might incline them more to safeguard the interests of criminal defendants, have few effective tools with which to counteract legislative overcriminalization, and they are increasingly excluded from the criminal adjudication process by plea bargains and legislative constraints on sentencing. These trends, in turn, lead to sporadic enforcement of criminal law, which undermines its credibility. Instead of trials designed to separate the innocent from the guilty, the system is dominated by plea bargaining, which sweeps up the innocent and guilty alike. This system is also too predisposed to criminalize widely practiced but officially condemned vice, because police and prosecutors can target enforcement toward a small, politically powerless segment of the offending population. The best strategy for fixing this system, Stuntz argued, was to empower judges to place constitutional

¹³ *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

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limits on legislative overcriminalization, through some combination of fair-notice requirements, desuetude constraints, and restoration of judicial discretion over sentencing.

In a related article, published a few years later, Stuntz analogized the criminal justice system to a funnel.¹⁴ At the broad end are the many citizens who find themselves in contact with the police. As the funnel narrows, one finds the smaller number of suspects who get charged, and then finally the even smaller number who go to prison. Stuntz argued that the Supreme Court had mistakenly focused on the broad end of the funnel. When police conduct harms a large number of people, they can form political coalitions to protect themselves and are thus less in need of judicial solicitude. Worse yet, by taking these issues out of politics, the Court pushed legislatures to devote greater resources to those spheres that they were permitted to govern. The upshot was that legislatures, determined to circumvent the Court's procedural rulings, focused on the narrow end of the funnel by expanding the scope of the substantive criminal law and authorizing more prison construction. Finally, the constitutional law of policing encouraged more law enforcement against poor defendants, while the constitutional law of trial procedure widened the gap between the plight of poor and wealthy criminal defendants.

Stuntz called for a radical overhaul in the constitutional law of criminal justice – reform that he believed was possible, albeit not very likely. Courts had a useful role to play, but less in defining the procedures for criminal investigation and adjudication than in ensuring equality of treatment and constraining the discretion of police and prosecutors. The constitutional law of policing, Stuntz argued, should focus less on protecting privacy and more on constraining violence, discrimination, and corruption. The constitutional law of criminal adjudication should focus more on adequately funding defense counsel, mandating consistent enforcement of criminal prohibitions, and ensuring that only the guilty get punished. Courts should insist on consistent punishments for similar crimes and be alert to racial disparities in sentencing. They should constrain prosecutors from inducing plea bargains through threats of excessive punishment.

Stuntz increasingly used contemporary issues of broad interest and great importance to shed light on criminal procedure. Invoking the O. J. Simpson murder trial and Kenneth Starr's investigation of President Bill

¹⁴ William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781 (2006).