

# **THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ**

## **INTRODUCTION**

In the fall of 2009, the three of us started planning a conference at Harvard Law School to celebrate the scholarly achievements of Bill Stuntz . Were it up to Bill, the celebration never would have taken place. Bill learned of our preparations—we had intended to keep them secret—almost as soon as the planning was underway. “I feel uncomfortable about this,” he remarked by email to 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.” Both before and after this message, he took each of us aside to voice these kinds of reservations.

We anticipated this reaction, as anyone who knew Bill would. Fortunately, this gave us an opportunity to plan our response. By teaming up on him, and by making our commitment to the conference clear, we persuaded him to allow it to go forward. Bill was of course quite wrong about his own stature and influence. He is widely viewed as the preeminent criminal procedure scholar, and one of the top legal scholars more generally, of the past twenty-five years. “Of course I’ll be there,” one leading scholar replied to the invitation. Every other scholar who was invited to participate in the conference also said yes, in several cases after rearranging existing commitments in order to attend.

As mistaken as Bill was about the significance of his scholarly contributions, he had another reservation that the three of us shared. Bill was already in his second year of Stage 4 cancer when we began planning the conference, and the prognosis was bleak. He was concerned that the participants would construe the book as a funeral, wear their dark suits, and behave accordingly.

None of us wanted an early funeral. We had a different kind of conference in mind. There would be space for tributes, and for remarks by mentors, colleagues, friends and students.

But the heart of the conference—the entire first day, and half of the second—would be dedicated to a serious exploration Bill’s work, the influence of that work, and of current criminal law and criminal procedure issues by a group of the nation’s preeminent scholars.

We asked each of the criminal law and criminal procedure scholars not just to think about these issues, but to write about them as well. The conference would be a “paper conference.” The papers were even more remarkable than we imagined, and they have now been collected as the chapters of this book.

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The reference to Bill Stuntz’s having been the leading criminal procedure scholar of the past twenty-five years was more precise than it may have seemed. This was exactly the span of his career as a legal scholar.

Stuntz started his teaching career at the University of Virginia School of Law in fall 1986, after having graduated from Virginia two years earlier. His entrance to the law school as a student had been rather less triumphant. The first time Stuntz applied, he was rejected. He and his wife Ruth moved to Charlottesville anyway, and Stuntz worked as a clerk at the Boar’s Head Inn, a local institution that was at the time the only upscale hotel in the Charlottesville area. During that year, Stuntz reapplied, and this time he was admitted. When he graduated three years later, he did so as the top student in his class. His law school success led to clerkships with Judge Louis Pollak in the Eastern District of Pennsylvania and with Justice Lewis Powell on the U.S. Supreme Court, followed by the offer to join the law faculty at Virginia.

At the outset of his teaching career, the largest question was just what Stuntz would teach and write about. Robert Scott—one of his law school mentors and later his dean—lobbied hard for his own discipline, commercial law. Commercial law scholarship had a long history, and it was in a particularly vibrant phase in the 1980s. Stuntz could quickly become a star. The future of criminal procedure, on the other hand, which he was finding dangerously enticing, was less clear. Stuntz nevertheless decided to cast his lot with criminal law and criminal procedure.

The mid 1980s did indeed seem an unpromising time for dramatic innovations in criminal procedure doctrine or scholarship. The heyday surely had been the 1960s, when the Supreme Court had restructured Constitutional criminal procedure with a series of pathbreaking rulings. This was the decade that brought *Mapp v. Ohio*, the decision that extended the exclusionary rule of the Fourth Amendment to the states, thus vastly expanding its scope;<sup>1</sup> as well as *Miranda v. Arizona*, which interpreted the Fifth Amendment to require that suspects be given their famous Miranda right warnings;<sup>2</sup> and *Gideon v. Wainwright*, which established a right to counsel under the Sixth Amendment, thus assuring representation for indigent defendants.<sup>3</sup>

The leading scholars of the mid 1980s had witnessed the Warren Court revolution first hand and, in some cases, had in at least small ways, helped to shape it. Yale Kamisar, the famous University of Michigan law professor, had written an influential article shortly before *Miranda* that may have influenced the Court's thinking.<sup>4</sup> He, like Wayne LaFare, the author of the leading treatise, had been present at the creation in the 1960s and the two remained towering presences twenty years later.

When Stuntz entered the field, many thought that criminal procedure was “written out.” The Burger Court seemed to be chipping away at some of the key Warren Court landmarks, so perhaps one could, if he or she were so inclined, write paeans to Justice Brennan's and Justice Marshall's dissents from the Court's shift in direction. Criminal law scholarship was in some respects more lively in the 1980s, but criminal procedure and substantive criminal law were treated as entirely separate domains. Almost no one wrote in both areas.

Ron Allen, Bill's co-author on a criminal procedure casebook some years later, remembers telling him that it would “kill brain cells” to become a criminal procedure scholar. No one says any of these things about criminal procedure scholarship—or indeed criminal justice

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<sup>1</sup> 367 U.S. 643 (1961).

<sup>2</sup> 384 U.S. 436 (1966).

<sup>3</sup> 373 U.S. 335 (1963).

<sup>4</sup> [CITE to Kamisar chapter in book edited by Ted White].

more generally—today. The field has been transformed, in very large part as a result of the work of William J. Stuntz.

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Stuntz's earliest articles already reflect many of the tendencies that would characterize his vision of criminal law and criminal justice. The first, a 1988 article entitled "Self-Incrimination and Excuse," noted that the Fifth Amendment privilege against self incrimination is invariably conceptualized in terms of privacy or autonomy values.<sup>5</sup> The actual caselaw was a very poor fit for either value, however. The Supreme Court had held that defendants can be ordered to give a blood sample, for instance, or to identify themselves at the scene of an accident. These and other anomalies suggested either that the doctrine had leapt the rails, or that something else was going on.<sup>6</sup> Stuntz argued for the latter. He began by homing in on a tension that lies at the heart of the Fifth Amendment: we expect defendants to be honest, but also worry that compelling honesty in this context would sorely tempt them to break the law. To reconcile this tension, Stuntz suggested, Fifth Amendment doctrine is best seen as analogous to excuse doctrine in criminal law. When a defendant is excused due to duress, we recognize that he has violated the law but conclude that he responded as most ordinary citizens would and therefore should not be held responsible. The Fifth Amendment cases, he argued, reflect similar intuitions.

In a 1991 article on the Fourth Amendment protection against unreasonable searches, Stuntz took up an even more controversial line of Supreme Court criminal procedure cases: cases that gave school principals sweeping authority to search their students' belongings; permitted the administrator of a government hospital to search the files in their doctors' office; and upheld a probation officer's warrantless search of a probationer's house.<sup>7</sup> The Court's explanation for giving the subjects of the searches less protection was that there were "special needs" in these contexts. Although the Court offered little guidance to as to what counted as a "special need,"

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<sup>5</sup> William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227 (1988).

<sup>6</sup> Nor is the "cruel trilemma a defendant might otherwise face in the absence of Fifth Amendment protection—the choice to disclose compromising facts, to lie, or to refuse to talk and risk being held in contempt— a satisfying explanation of the case law. After all, the cruel trilemma is only cruel for defendants who have committed a crime.

<sup>7</sup> William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553 (1992). The cases are [CITES from 553-4.]

and the academic commentary was almost universally critical, Stuntz suggested that the distinction between these and other Fourth Amendment cases may actually be justified. Still more surprisingly, Stuntz argued that the subjects of these searches were probably better off under the less protective regime than under the traditional approach.

How could this be? The answer, Stuntz argued, lies in a consideration of the alternatives available to the searchers if their search rights were restricted. If the principal were not permitted to search a girl's purse for cigarettes, he could impose more restrictive rules throughout the school. If students tended to smoke in the bathroom, he could strictly monitor use of the bathrooms. Alternatively, he could punish the student based on a suspicion of smoking, even if he couldn't be certain she had indeed smoked. Given these more draconian alternatives, the average student would, if she thought all the options through, likely prefer to have less protection against searches. With ordinary searches, by contrast, the police do not have a realistic option for regulating the defendants in other, worse ways. From this perspective, the distinction between the cases, which seems ad hoc, actually is altogether sensible. If there are problems in the principal-student, probation officer-probationer, or other "special needs" relationship, they are problems with the extent of the searcher's background powers, rather than shortcomings of the Fourth Amendment caselaw.<sup>8</sup>

In another early article, Stuntz dissected the Fourth Amendment warrant requirement.<sup>9</sup> Given that "[l]egal standards are usually enforced through after the fact review, for the good and simple reason that before-the-fact review tends to be quite costly," the "very existence" of a warrant requirement seems puzzling. After pointing out that none of the apparently obvious explanations for the requirement is compelling—while the magistrate provides "neutral" oversight, for instance, so would the judge if the search were challenged after-the fact—Stuntz constructed an alternative set of explanations. One explanation focuses on the potential bias in a judge's after-the-fact determination of whether the police had probable cause to conduct a search. Given that the defendant is unusually unsympathetic—after all, he is trying to exclude evidence of criminal behavior-- an ex post hearing is unusually prone to pro-police bias. The

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<sup>8</sup> *Id.* at 591.

<sup>9</sup> William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991).

warrant requirement can correct for this bias by requiring that the police make their case before anyone knows what the search will uncover. A second rationale focuses on the risk of police perjury. In an after-the-fact hearing, the police can use details gleaned from the search itself to buttress their claim that they had probable cause before the fact.<sup>10</sup> Stuntz argued that these alternative rationales help to explain the fierce disagreement between the majority and the dissenters in a series of Supreme Court cases upholding warrantless searches despite the absence of the kinds of exigent circumstances that the Court had previously required as a prerequisite for forgoing a warrant. The majority was motivated by one understanding of the warrant requirement, Stuntz suggested, and the dissent by the other. “The standard attack on the Court’s position argues against any narrowing of the scope of the warrant requirement,” Stuntz wrote.<sup>11</sup> “This makes sense if warrants are seen as a tool to combat not after-the-fact bias, but police dishonesty instead.”<sup>12</sup> From this perspective, warrants “make officers record what they know before the search takes place, and thus make it hard for them to lie about what they knew when they testify at suppression hearings.”<sup>13</sup> For the majority, by contrast, the principal concern is judicial bias. Because bias is most worrisome when the personal stakes for the suspect are highest, it makes sense to require warrants in some cases but not others.

Many of the classic Stuntzian themes and tendencies were already on full display in these early articles. The first is an impulse to bridge the divide between criminal procedure and general criminal law. By invoking the excuse doctrines of general criminal law to make sense of Fifth Amendment doctrine, Stuntz suggested that the same underlying principles ran through both bodies of law. In his analysis of the constitutional dimensions of the warrant requirement, he drew on the practical realities of policing and police testimony—the stuff of ordinary criminal law. In retrospect, particularly for those peering in from outside, it is hard to imagine criminal law and criminal procedure as separate. But they were.

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<sup>10</sup> Each of these explanations applies when the remedy for an improper search is exclusion. Stuntz offered an alternative explanation for the warrant requirement in contexts (including many states priority to *Mapp v. Ohio*) where the remedy is damages. Here, he argued, warrants counteract the danger that damages will overdeter police officers by decreasing the risk that a search will be successfully challenged later. *Id.* at 906-910.

<sup>11</sup> *Id.* at 925.

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

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

Second is Stuntz’s preternatural ability to identify the paradoxes and puzzles that make hard cases and issues difficult. In the early articles, he injected fresh, counterintuitive perspectives into debates that had seemed headed for tedious if passionate stalemate. His analysis of the application of the Fourth Amendment to the “special needs” cases—which shared the Court’s critics’ assumption that students should be protected but concluded that the Court’s holdings were doing precisely that—was a classic example of a tendency that runs through all of Stuntz’s work. Stuntz didn’t slice the Gordian knot so much as show that we’ve been looking at the knot the wrong way, and that it just might be possible to unravel it.

The third tendency is a pervasive focus on political economy and incentives. Traditional criminal procedure scholarship paid very little attention to the possibility that different rules might shape the behavior of criminal suspects, the police, and other actors in different ways. Although the law-and-economics revolution in American legal scholarship was well into its second decade, it had left criminal procedure scholarship largely untouched. Stuntz was the first to use (or at the least, to use systemically) incentives, agency costs, and other standard tools of law and economics analysis. This is foregrounded in a widely influential analysis of plea bargaining he co-authored with Bob Scott,<sup>14</sup> but it can be seen every Stuntz article. In his later articles, he would often talk about the “price” of a criminal procedure rule, thus underscoring the tradeoffs posed by legal change.

Fourth, the articles steer clear of absolutes. In part, this reflects personal and scholarly modesty that Michael Seidman explores in his chapter for this volume. Not too many legal scholars would devise a theory and acknowledge that their conclusions are “guesswork,” or concede that his argument may not be right, as Stuntz did in these articles.<sup>15</sup> But it also reflects an inclination toward pragmatism and a suspicion of rigid adherence to simple, absolute principles. Stuntz’s target in the early articles was criminal procedure scholars’ tendency to criticize each new Fourth or Fifth Amendment case that seemed to interfere with suspects’ privacy or autonomy in any way. Because most privacy and autonomy advocates were

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<sup>14</sup> Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

<sup>15</sup> Stuntz, *supra* note xx, at 935 [warrants and remedies](describing conclusions as “guesswork” and “necessarily speculative”); Stuntz *supra* note xxx, at 590 [Stanford] (“If this argument is right (which depends, of course, on the plausibility of my empirical guesses”).

politically liberal, Stuntz was initially criticized for his conservatism. But he was equally critical of absolutism on the right, as when he later criticized originalism and textualism. The common theme was a skepticism of purist approaches.

Finally, Stuntz suggested that the particular concern of criminal procedure doctrine should be the innocent, not simply guilty defendants. This tendency reflected a more populist stance toward Bill of Rights amendments than was conventional in the criminal procedure literature. In this respect, these articles echoed some of the themes that were being developed by Akhil Amar during this period, though Amar's emphasis was more historical and he had greater sympathies for originalism than Stuntz did.<sup>16</sup>

In one respect, the early articles were conventional: like other criminal procedure scholars, Stuntz focused primarily on constitutional criminal procedure, especially the Fourth and Fifth amendments, as reflected in the Supreme Court caselaw. The early articles also tend to defend—more enthusiastically on some issues than others—the current criminal procedure caselaw. This concern with current doctrine did not disappear. But as David Sklansky details in his analysis of Stuntz's work in this volume, the focus would broaden considerably and its analysis of the criminal justice system would become increasingly complex.

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If one had to pick the single most important criminal procedure article of the past twenty-five years, the choice might well be “The Uneasy Relationship Between Criminal Procedure and Criminal Justice,” which Bill published in 1997.<sup>17</sup> Unlike the earlier articles, which attempt to identify the underlying logic of criminal procedure doctrine, “The Uneasy Relationship” puts Supreme Court doctrine expands the frame of reference to encompass the criminal justice system as a whole, as well as the general surge in crime during this period. The system described in “The Uneasy Relationship” is complex (a quality that figures prominently in David Sklansky's assessment in this volume), with each player responding to background constraints and the other

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<sup>16</sup> [CITE to Amar's 1997 book]

<sup>17</sup> William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).



players in the system. The big losers, Stuntz argues, are criminal defendants—especially innocent defendants.

The principal background factor in Stuntz’s account was the high crime rates in the 1960s and 1970s as the Warren Court expanded the Bill of Rights protections for criminal defendants. While the combination sounds like a recipe for a serious backlash—particularly from prosecutors bristling at the Court’s constraints on their discretion—Stuntz argues that the high crime rates actually made the new doctrines less costly for prosecutors. “More regulation is supposed to mean higher cost and higher quality, coupled with lower quantity,” Stuntz wrote.<sup>18</sup> “But rising crime rates mean more strong cases, giving police and prosecutors the option of being more selective. The strength of the marginal case is likely to increase, as is the proportion of cases that appear to be clear winners for the government.”<sup>19</sup> The percentage of guilty pleas increased throughout this period, as this reasoning might predict.

For criminal defendants, the key factor is the severely limited funding of public defenders, whose fees for a case are capped at low levels. Because of the financing constraints, the advent of new criminal procedure protections did not add to the number of defenses available to a large majority of criminal suspects represented by public defenders, at least not in practice. Because the maximum fee is so low, defense attorneys prod their clients toward plea bargains, and when they do litigate, ration the number of defenses they pursue. This creates a bias toward procedural objections—especially exclusionary rule claims—which are simple and cheap to raise. Defending the case on the merits is far more costly, because it requires a willingness to go to trial.

Legislatures shape the criminal justice system in two important ways. First, they can counteract the effect of judicial restrictions on police and prosecutors by expanding the scope of criminal law. A broader definition of criminal behavior makes it easier for prosecutors to make their case, thus neutralizing the effects of the new procedural protections. Second, legislatures

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<sup>18</sup> *Id.* at 26.

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

control the amount of funding available to public defenders, which also tilts the balance back toward prosecutors.

By comparison to the largely sanguine assessment of Stuntz's earlier articles, this analysis of the criminal justice system as a whole is more alarmed. The revolution in constitutional criminal procedure has introduced a series of distortions into criminal justice. Because wealthy defendants can afford to make use of all the new protections, but indigent defendants cannot, class bias in the system has been exacerbated. So too has the potential for racial discrimination, because the expansion of substantive criminal law has magnified prosecutors' discretion, and the new procedural protections do not restrict their choice as to which suspects to pursue. Innocent defendants are also disadvantaged, because the increasing reliance on procedural defenses decreases the gap between the likelihood that guilty defendants will be sentenced and the likelihood for innocent defendants.

The influence of "The Uneasy Relationship" has been immense. If the early articles offered a fresh, counterintuitive perspective on Fourth and Fifth Amendment scholarship, a way out of the old doctrinal tug-of-war between criminal suspects' privacy and the needs of the police, "The Uneasy Relationship" suggested a new vision for criminal procedure altogether. By considering the criminal justice system in its entirety, Stuntz showed even more clearly the artificiality of the boundaries between criminal law and criminal procedure; each, in his conception, influenced the other. His analysis of incentives and political economy suggested that each participant in the overall system shapes and is shaped by the actions of the others, and in doing so opened up a myriad of new avenues for research, both for Stuntz himself and for other scholars. And the insight at the heart of the analysis—that the Warren Court revolution in constitutional criminal procedure may have left criminal suspects worse off—was stunningly counterintuitive, in the classic Stuntzian mode.

With "The Uneasy Relationship," two new features emerged in Stuntz's work. The first was a newly prominent focus on racism and class bias in the American criminal justice system. There were hints of this concern even in the earliest articles. Starting with "The Uneasy Relationship," which emphasized both themes, Stuntz's work became increasingly critical of

these biases and their destructive effect on black communities. As discussed below, the book that crowned his scholarly career is a plea to reverse the part that American criminal justice has played in the breakdown of urban black communities.

The second new development was an extensive, even wonkish use of crime data to inform his work. In the earlier articles, Stuntz, like many scholars then and now, often speculated about what a careful empirical analysis might show. Although Stuntz never conducted direct empirical analysis, he drew increasingly heavily on the crime statistics collected by police departments and other investigators. Anyone who dropped by his office in the mid 1990s, would have seen volumes of the Sourcebook on Criminal Justice published by the Department of Justice, and the FBI's Uniform Crime Reports, and might well have been regaled with some new discovery Bill had made. These data and their use would become central to his subsequent work.

In “The Uneasy Relationship,” Stuntz’s treatment of Fourth and Fifth Amendment doctrine is, by his standards at least, stylized. The doctrine, and the role of appellate courts, is a single component of the larger framework of moving parts. But Stuntz also continued to wrestle with the intricacies of the Fourth and Fifth Amendments. In a pair of companion articles, both published in 1995, Stuntz put the contemporary doctrine in historical perspective.<sup>20</sup> In both articles, Stuntz explained the preoccupation with privacy in the Fourth and Fifth Amendment cases as a historical accident, and argued that its effects have been perverse. The original cases were actually designed to curb the government’s ability to prosecute critics and suspected heretics. Their origin was thus substantive—they were a check in the breadth of criminal laws—not procedural. Although the 1886 case of *Boyd v. United States* announced a sweeping privacy right for businesses,<sup>21</sup> this right was steadily eroded to accommodate, Stuntz argued, the legitimate needs of the regulatory state. If regulators were kept entirely at bay, they would have little hope of effectively overseeing business. With criminal suspects, on the other hand, the Court took an altogether different path, eschewing pragmatic accommodation in favor of an insistent protection of privacy. This alternative course culminated in the Warren Court’s

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<sup>20</sup> William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995); William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995).

<sup>21</sup> *Boyd v. United States*, 116 U.S. 616 (1886).

criminal procedure cases. The results, Stuntz argued, have been perverse. Police searches of houses are heavily regulated, and suspects' privacy is vigilantly protected, yet there is little protection against violent or coercive policing. The doctrines need to be reoriented, he insisted, to focus more on violence and coercion.

The Stuntzian tendencies we have seen also are evident in his work on several casebooks starting in this era. Along with a handful of co-authors, Stuntz wrote new casebooks in [FILL in DETAILS].

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The articles of the mid 1990s contained the seeds of the great flourishing of Stuntz's work in the final dozen or so years of his career. One strand of this work explored the criminal justice system and what he increasingly perceived as its "pathological" politics. The second major strand continued to focus on Fourth and Fifth Amendment doctrine.

This work came in the midst of major change in Stuntz's own life. In 2000, he moved from the University of Virginia, which has been his primary home for most of the previous two decades, to Harvard. Bill loved Harvard and quickly came to love the Boston area. From this perspective, the change was a happy one. But it soon was accompanied by a series of devastating health crises. Shortly after the move, he wrenched his back while changing a flat tire on the way back from a family vacation, which led to increasingly debilitating back problems that left him in excruciating pain for the remainder of his life. (He once analogized the pain to having an alarm clock taped to his head that was ringing and could not be turned off). In early 2008, he was diagnosed with colon cancer. This brought multiple rounds of chemotherapy, more operations, and eventually his death.

It is tempting to attribute the concern for class bias and racial discrimination in criminal justice that pervades Bill's late work to a sensitivity borne of his own suffering. But these concerns predate the health woes we have just described. The passionate concern for the breakdown of American criminal justice was already emerging, not just in "The Uneasy

Relationship” but in a 1998 essay on the disparate treatment of crack and cocaine users and a 1999 article on class bias in the Fourth Amendment’s privacy protections.<sup>22</sup> The unmistakable continuities between Bill’s earlier and late work thus caution against the temptation to personalize too quickly.

A major theme of the first of the two major strands of Stuntz’s work—its concern for the criminal justice system as a whole—is a perverse dynamic of the legislative process. Faced with a decision whether to vote for a proposed new federal crime, lawmakers are far more likely to vote than against. Stuntz identified this tendency in “The Uneasy Relationship,” focusing primarily on the possibility that legislators might consciously expand the criminal code to weaken the constraints on police and prosecutors of the Supreme Court’s criminal procedure restrictions. In another classic article, “The Pathological Politics of Criminal Law,” Stuntz analyzed the dynamic in much detail. “How,” he asked, did criminal law come to be a one-way ratchet that makes an ever larger slice of the population felons ...?”<sup>23</sup> Stuntz linked the one-way ratchet to prosecutorial discretion. Because prosecutors decide whom to pursue, they rather legislators will be held responsible if the statute is overbroad and prosecutors use it to convict a defendant whose behavior seems benign. But legislators will be held responsible if they vote against an expansion of criminal law and an obvious criminal later escapes punishment. Expanding criminal law also makes prosecution cheaper and thus reduces the danger that prosecutors will prosecute too little. Finally, the stigmatizing effect of being targeted for prosecution reduces the likelihood that interest groups will emerge to oppose a proposed expansion of criminal law.

In still another major article, Stuntz argued that the Supreme Court’s focus on criminal suspects has distorted the politics of criminal justice.<sup>24</sup> Criminal justice, he suggested, is like a funnel. A large number of citizens are searched—this is the broad end of the funnel; a smaller number become suspects; still fewer are actually charged; and the smallest number—the bottom

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<sup>22</sup> William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 (1999).

<sup>23</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001).

<sup>24</sup> William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781 (2006).

of the funnel, go to prison.<sup>25</sup> The Supreme Court constitutional criminal procedure decisions have targeted the broad end of the funnel—those who are searched—far more than those in the narrower parts of the criminal justice funnel. But because those who may be searched are a very large constituency, they are likely to be well protected by the ordinary political process and in the least need of judicial protection.

Stuntz’s preferred solutions to these problems often involved judicial intervention. Courts should aggressively police the requirement that suspects be given adequate assistance of counsel, and they should refuse to allow conviction under laws that are not systematically enforced. As discussed below, he also increasingly argued that the Supreme Court should rely more on the Equal Protection Clause than on the Fourth and Fifth Amendments in its constitutional cases.

In his later articles on the Fourth and Fifth Amendments—which we have characterized as a second major strand in the work—Stuntz continued to explore the perverse effects of the Supreme Court’s emphasis on privacy. The Supreme Court caselaw provides far more protection for suspects in nice homes than for poorer suspects who live in more crowded, and thus more “public,” dwellings. With drug crimes, Stuntz argued, the bias is exacerbated. Because these crimes are optional for prosecutors as compared to burglaries and murders, and street sales in poor neighborhoods are much easier to pursue than cocaine use in the suburbs, prosecutors will target the poorer, often black neighborhoods. “If this possibility is right,” Stuntz argued, “Fourth Amendment law is in no small measure responsible for the drug war’s enormous racial tilt.”<sup>26</sup> The Supreme Court’s *Miranda* warnings are similarly perverse, providing a zone of protection for well-informed defendants “while unsophisticated suspects have very nearly no protection at all.”<sup>27</sup> Rather than privacy, and rather than inviting well-counseled suspects to avoid questioning altogether, Stuntz continued to argue that the Supreme Court should pay more attention to police behavior, preventing coercion and ensuring that any questioning is fair.

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<sup>25</sup> *Id.* at 782.

<sup>26</sup> William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, at 1285 .

<sup>27</sup> William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 977 (2010).

The other major theme in Stuntz's later Fourth and Fifth Amendment articles was the need for a more flexible Fourth Amendment. The O.J. Simpson trial and Kenneth Starr investigation of Bill Clinton showed the folly of a single, "transsubstantive" standard.<sup>28</sup> In the Simpson trial, the standard proved too strict, forcing the prosecutors to tell a dubious story to prevent their search evidence from being excluded, whereas the rules were not strict enough to reign in Starr's less urgent investigation. Stuntz argued that the standard should vary by offense, with higher constraints for less serious offenses. In an essay written in the wake of the 2001 terrorist attacks, Stuntz also argued that the strictness of Fourth Amendment constraints should, and indeed do, vary through time.<sup>29</sup> When levels of crime are high, the constraints should be relaxed to reduce the costs to the police of handling the increased crime. In these articles, as in his earliest work, Stuntz argued for a pragmatic approach to the Fourth Amendment, rather than fixed pursuit of a good such as privacy.

Stuntz also questioned the use of the Bill of Rights amendments as the principal source of protection for criminal suspects and defendants. Throughout this final period, he often proposed that courts use the Equal Protection Clause to curb discrimination by the police and prosecutors. This, in his view, was the road not taken in American criminal justice, a view would become a central theme of the book that culminated his career. In Stuntz's view, the Court's emphasis on the Fourth, Fifth and Sixth Amendments rather than the Equal Protection Clause (together with a decline of local democracy in criminal justice, as discussed below) led to the unintended consequences outlined in his "system" articles, and inadequately responded to the racial discrimination and class bias in American criminal justice.

One other set of themes also featured in Stuntz's writings in the last period of his life. These might loosely be described exploring as the moral dimension of criminal law. The articles in this vein were in a sense an offshoot of his work on the criminal justice system (and thus could be characterized as part of the first strand of his work), and they overlapped in significant respects with his writings on Christian legal theory and his Christian faith.<sup>30</sup> Stuntz pointed out

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<sup>28</sup> William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842 (2001).

<sup>29</sup> William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002).

<sup>30</sup> See, e.g., William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 707 (2003).

that moral campaigns to criminalize vice or to enshrine one side's stance on culture wars issues like abortion or gay rights often proved "self-defeating."<sup>31</sup> If vice laws are not systematically enforced, they often lead to discriminatory enforcement, which undermines the very moral norms they are intended to further. And the use of law as a tool in the culture wars often produces a backlash. Stuntz also explored the moral and cultural costs of perceived discrimination in the war on drugs, and in pretextual prosecutions of notorious figures and celebrities.<sup>32</sup>

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As Walt Whitman once said of himself, Stuntz's writings are vast; they contain multitudes. Every article—every page, it sometimes seemed—confounded conventional wisdom and offered counterintuitive insights. Stuntz sounded deeply conservative at times—as when he defended intrusive policing and refused to condemn all forms of profiling after the September 11 attacks; but quite the opposite at other times—as when he characterized Ronald Reagan as tapping into unhappiness with the Warren Court's criminal procedure rules and thus subtly appealing to many Americans' racism. Although the general tendencies and structure of Stuntz's work remained consistent (and recognizably Stuntzian), particularly from the mid 1990s onward, he changed his views in small and at times larger respects. As David Sklansky points out in this volume, Stuntz initially defended moralist criminal legislation, and expressivism in criminal law, but his stance later became far more critical. After largely defending plea bargaining practices as rational bargaining in a 1992 article with Robert Scott, he later argued that plea bargaining does not function like ordinary bargaining because prosecutors lack the incentive to obtain the highest possible sentence.<sup>33</sup> The precise contours of his historical analysis of Fourth, Fifth and Sixth Amendment doctrine shifted, although his underlying contention that the Supreme Court took a serious wrong turn did not change.

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<sup>31</sup> William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871 (2000).

<sup>32</sup> Stuntz, *Race, Class, and Drugs*; Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

<sup>33</sup> William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).



*The Collapse of American Criminal Justice*<sup>34</sup>—the posthumous book that is already viewed, quite correctly, as Stuntz’s magnum opus-- has all of these Stuntzian qualities in abundance. It brings the two major strands of Stuntz’s criminal justice work fully together. As one of us has noted elsewhere, the book is sprawling, almost overflowing. The basic structure of the book is historical, with overlapping histories in the first two of its three parts. After contrasting the proceduralism of the American Bill of Rights to the more substantive French Declaration of the Rights of Man, Stuntz begins the Reconstruction period after the Civil War. In his reading, Reconstruction Era politics (Republicans’ effort to edge closer to the Democratic, anti-Reconstruction position) stunted the potential use of the new Equal Protection Clause to curb discrimination in criminal justice, leaving Due Process as the only source of protection. Subsequent chapters recount criminal justice in the Gilded Age; the use of the criminal law to wage moral campaigns, and the symbolic politics this spawned; and the Supreme Court’s fateful mid and late twentieth century decisions to ground its criminal justice protections in procedure rather than substance, to rely on due process rather than equal protection, and to anchor its due process protections in the Bill of Rights rather than a “treat everyone fairly” requirement of the sort the Court had hinted at in a few of its twentieth century decisions.

In addition to the historical analysis, which is far more detailed and extensive than in any of Stuntz’s previous work, the principal new contribution of *The Collapse of American Criminal Justice* comes in its concluding chapter and part. Here, as in his last major article, Stuntz makes a case for a return to the more localized justice of a century ago. Although criminal justice was distorted by Jim Crow in the South, in the north criminal defendants were tried by prosecutors who were selected by urban machines that depended on ethnic votes, before jurors who came from the defendants’ neighborhoods. With defendants who had allegedly burglarized or harmed a victim, the jurors felt a strong urge for punishment; but they also appreciated the costs of punishment for the defendant, his family and the community from which they all came. This neighborhood justice disappeared as whites fled the cities, but continued to shape the election of prosecutors, who are generally elected by county-wide votes. Stuntz argues that judicious use of

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<sup>34</sup> WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (HARVARD UNIVERSITY PRESS, forthcoming 2011).

the Equal Protection Clause to curb discrimination and reemphasizing local justice are our best hopes for reversing the disfunctions that plague American criminal justice.

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These ideas and perspectives have transformed our understanding of criminal justice. Many scholars still focus primarily on either criminal law or criminal procedure, but everyone now agrees that the two are inextricably linked. Debate continues on the legacy of the Warren Court's criminal procedure decisions, but few would now dispute Stuntz's contention that the famous cases had serious unintended consequences. Whether they agree with Stuntz's own conclusions or not, scholars also are far more likely to look at the interaction of the players in the overall criminal justice system, and the political factors that shape it.

Although the authors in this volume are diverse in nearly every other way, they have one quality in common: each is one of the leading criminal justice scholars in America (and in many cases, the world), and each has been deeply influenced by Bill Stuntz and his work. They have responded or been shaped by Stuntz's ideas or example quite differently, and that variety is reflected in the chapters they have provided for this book.

The book is divided into three major parts, which loosely track the authors' focus, the different dimensions of criminal justice, and the principal strands of Stuntz's own work. Part I addresses the political economy of substantive criminal law. The chapters in Part II take up issues that arise in the context of police investigation. The principal concern in Part III is judicial discretion and the judicial role in criminal justice. The book concludes with a brief essay by Stuntz himself suggesting themes that may warrant more attention by future scholars.

### **The Political Economy of Substantive Criminal Law**

Part I begins with "Political Dysfunction and the Machinery of Capital Punishment," by Joseph Hoffmann. "Political Dysfunction" draws on Hoffman's own experience in the

legislative debate over death penalty reform in Illinois. When Illinois legislators debated a proposal to require that there be “no doubt” as to guilt as a prerequisite to imposing the death penalty, Hoffman testified in favor of the legislation; Professor Andrew Leipold, another contributor to this volume, testified against, and both were ignored. Critics of the death penalty claimed the legislation would increase the number of death penalty cases, while opponents attacked it as an attempt to make it impossible to use the death penalty. Although the claims were inconsistent, the joint opposition killed the legislation. Hoffmann believes that this dysfunctional politics is characteristic of current death penalty debate. The practical consequence of this stalemate, he concludes, is that a temporary moratorium on the death penalty—as in Illinois—is likely to prove irreversible, producing de facto abolition.

In “Bill Stuntz and the Principal-Agent Problem in American Criminal Law,” the second chapter, Richard McAdams argues that agency costs—the potential conflict between the interest of agents such as prosecutors and the principals whose interests they represent-- are particularly pronounced in criminal law, yet receive surprisingly little attention in the literature. Although Bill Stuntz rarely used the standard economic jargon of agency costs, he offered an account of agency cost considerations that is in many respects more sophisticated than the formal law and economics literature on criminal law. McAdams notes, for instance, that the standard economic assumption that very large penalties and a low probability of enforcement will produce optimal deterrence conflicts with the reality that prosecutors will focus on, and aggressively enforce, criminal behavior that legislators single out for high punishment. A particularly remarkable feature of the principal-agent relationship in criminal law, in McAdams’s view, is the “multiplicity of independent agents.” Before an individual may be criminally punished, for instance, seven sets of agents must assent. McAdams argues that these agency costs issues belong at the center of criminal law scholarship, and singles out Stuntz’s insights into the one-way ratchet of criminalization, the connection between vice crime and unequal enforcement, and the differences in criminal justice at the federal, state and local levels as models for principal-agent analysis.

In “The Demand Side of Overcriminalism,” Daniel Richman explores a feature of overcriminalism that does not feature prominently in Stuntz’s work: the use of the criminal law

to regulate issues that one might ordinarily expect to be regulated by civil law, and whose proponents might actually prefer civil regulation. In the United States, much more than most countries, a wide range of public welfare and other obligations are regulated under criminal law, a tendency Richman attributes to factors such as the American penchant for proceduralism and the historical lack of regulatory actors other than police, prosecutors and the judiciary. The availability of criminal law as a “grab-bag” makes it attractive both for those who dislike regulation—because it does not require a new regulatory apparatus—and for their pro-regulatory opposites. As a result, Richman argues, “the shadow of criminal law offers some alluring shade for the advancement of agendas that are only contingently related to criminal law.” While there is no simple solution to this warping of the criminal law, Richman calls for an increased emphasis on noncriminal institutions.

The fourth chapter, “Stealing Bill Stuntz” by David Sklansky, opens by comparing Bill Stuntz to Charles Dickens. Just as writers from every political perspective claimed Dickens as an ally, so too has Stuntz been embraced by everyone from Burkean skeptics to revolutionary liberals. Sklansky attributes the breadth of affinity to the presence of three distinct themes that run through Stuntz’s work, and which appeal to different sets of admirers: the argument that “criminal justice must be understood as a complicated system,” the emphasis on political economy and the fact that “the system involves allocation of resources through markets and pricing;” and Stuntz’s overriding concern for “the least well off.” With Stuntz’s emphasis on the complexity of the criminal justice system, Sklansky notes that Stuntz changed his mind about the virtues of moralism, shifting from advocate to critic; and he suggests that the blurring of the lines between the prevention of terrorism and the criminal law, which Stuntz emphasizes, parallels a similar blurring of lines between criminal law and the enforcement of immigration rules. Stuntz’s key contribution to our understanding of the political economy of criminal law was, Sklansky argues, to focus attention on the tradeoffs reflected in our rules. The third theme—egalitarianism—became an increasing focus for Stuntz in the late 1990s. Sklansky suggests that Stuntz’s real concern was decency, a quality closely associated with Stuntz’s religious faith, and that this is reflected in his confidence in local democracy. Sklansky argues that one dimension that does not find full expression in Stuntz’s emphasis on pragmatism and public choice is the role of leadership, idealism, and personal decency in shaping criminal law.

## Police Investigation

In Part II, the focus shifts to issues that arise in police investigation. In Chapter 5, “What the Police Do,” Anne Coughlin develops a conception of police interrogation as analogous to seduction. [DETAILS to be ADDED].

In Chapter 6, “The Distribution of Dignity and the Fourth Amendment,” Tracey Meares explores the regulation of searches and seizures by the police under the Fourth Amendment. Meares notes that her earlier work proposing that courts pay greater attention to the question whether a community has internalized the burdens of a law, rather than shifting its burdens to other groups, was obviously “in conversation” with a 1999 Stuntz article that drew attention to the distributional impact of the Fourth Amendment on minorities and the poor. This earlier work focused more on the contextualization of rights than on the distributional consequences of the benefits that inhere in rights. In this chapter, which draws on new work with Bernard Harcourt, Meares focuses more directly on distributional considerations. Her particular target is the “individualized suspicion” requirement that has long been used as the touchstone for validating or validating searches and other police action. Meares questions its binary, either/or quality. In Meares’s view, courts should place far more emphasis on assuring “evenhandedness” in the application of the Fourth Amendment. “[T]he model of a checkpoint, she argues, “with its attendant randomization mechanism, should serve as the lodestar for reasonableness under the Fourth Amendment.” In her view, randomization not only would reduce “the negative distributional consequences of targeting,” but it would encourage more polite, positive encounters between the police and people of color-- encounters that “actually *confer* dignity.”

In Chapter 7, “Why Courts Should Not Quantify Probable Cause,” Orin Kerr explores another dimension of the Fourth Amendment, its requirement that the police show “probable cause” if they wish to obtain a warrant. In Stuntzian fashion, Kerr begins with a puzzle, asking why the Supreme Court has never made a serious attempt to quantify just what “probable cause” means, and whether it should. Although the Court itself has never really explained its failure to

define probable cause, Kerr argues that it has been right to eschew precise definitions. Because the affidavits filed by police officers leave out crucial information—such as information about investigative techniques the police have tried that did not produce evidence, and potential techniques they have not pursued—the affidavit may be seriously misleading. Kerr illustrates the potential bias with a colorful illustration involving a request to search a Harvard College dormitory room for marijuana based on a definitive study showing that marijuana can be found in 60% of Harvard dorm rooms. Although this might appear to establish probable cause, factors omitted from the affidavit (such as the police’s failure to use a pot detector that predicts the presence or absence of pot with 99% accuracy) might cast the affidavit in a very different light. Given that the information in an affidavit can be seriously misleading, Kerr argues that a judge’s “situation sense” plays a crucial role in the determination whether the probable cause standard has been met. Quantifying probable cause would reduce the scope for judges to use their situation sense, and thus would make the determination less rather than more accurate.

With Chapter 8, the focus shifts to the other major constitutional constraint on police investigation, the Fifth Amendment privilege against self-incrimination. In “DNA and the Fifth Amendment,” Erin Murphy explores the question whether the Fifth Amendment might provide a basis for challenging statutes that compel criminal suspects to provide DNA samples to law enforcement officers. Although DNA collection is often challenged on Fourth Amendment privacy grounds, Fifth Amendment challenges are less common, are often desultory, and are routinely swatted away by courts with little discussion. The obvious impediment to these claims is *Schmerber v. California*, which held that a suspect can be compelled to give a blood sample because the sample is “nontestimonial” in nature. Drawing on the Supreme Court’s broadening of Fifth Amendment protection for the production of documents, after a sweeping earlier denial of the protection, Murphy argues that Fifth Amendment arguments may not be as hopeless as they seem. The principal objections to this reasoning were noted by Bill Stuntz many years ago: requiring a defendant to provide DNA does not create a risk that the defendant will lie, and if DNA collection were prohibited, the police might simply obtain the DNA by other means. Despite these concerns, Murphy concludes that “when one considers the ramifications of current DNA policy for concerns about racial and socioeconomic distributional justice—both issues that

Stuntz turned to with great care and concern in his later years,” the Fifth Amendment case against DNA collection is worth a serious second look.

### **Emotion, Discretion and the Judicial Role**

Part III turns to Emotion, Discretion and the Judicial Role. Several of the chapters in this part focus on judicial discretion, Stuntz’s strategy of choice for addressing many of the pathologies in current criminal justice. But the lens expands to include other decision makers, including Bill Stuntz himself.

In Chapter 9, “Two Conceptions of ‘Two Conceptions of Emotion in Criminal Law,’” Dan Kahan identifies and probes two conceptions of emotion in criminal law: “a *mechanistic* one that conceives of emotions as thoughtless forces that interfere with volition, and an *evaluative* one that conceives of them as thought-pervaded moral assessments that can be judged as either right or wrong, good or bad, and not merely as weak or strong.” Kahan accepts the distinction but proposes an understanding that differs from the one adopted by other scholars. The prevailing view sees the evaluative conception as involving a species of self-conscious moral evaluation of actors’ emotions by decisionmakers. Kahan, by contrast, sees the evaluative conception as “emanating from the unconscious role of decisionmakers’ cultural outlooks, which unwittingly shape how decisionmakers perceive the *intensity* of emotions and related facts that are the focus of the mechanistic view.” After surveying the psychological evidence on which his alternative position rests, Kahan argues that it solves a puzzle the conventional position cannot—namely, “why decisionmakers would purport to be assessing emotions mechanistically if in fact their assessments reflect moral evaluations.” He also discusses how the alternative view may undermine what is usually taken to be the normative significance of the standard account of the two conceptions of emotion in criminal law.

In Chapter 10, “Patrolling the Fenceline: How the Court Only Sometimes Cares About Preserving its Role in Criminal Cases,” Andrew Leipold explores the extent to which the Supreme Court has “[used] its constitutional authority to allocate and limit power among actors

in” the system of criminal justice,” and to assure fair trials that fully honor the expectations of the Sixth Amendment right to a jury trial in criminal cases. The three most important lines of criminal procedure cases of the past decade—the Court’s sentencing cases, its war powers decisions, and its cases requiring the evidence be testimony be tested by cross examination—all fit this pattern. But two other lines of recent cases are, in Leipold’s view, impossible to reconcile with the Court’s emphasis on vigorously policing boundaries. In *United States v. Ruiz*, the court rejected a defendant’s claim that her plea bargain was invalid because she was required to waive her right to receive Brady material—that is, evidence that might call government testimony into question or support an affirmative defense—as a condition of receiving the bargain. In *United States v. Cotton*, the court held that the government’s failure to allege a federal crime does not automatically deprive it of subject matter jurisdiction. In each case, Leipold argues, the Court undermined its own role without providing an adequate explanation for what it was doing. In *Ruiz*, the Court effectively deprived itself of an oversight role in plea bargaining—which as Stuntz and Bob Scott pointed out two decades ago, “*is the criminal justice system;*” while *Cotton* has not muddied Court’s own role in policing the jurisdictional requirements for criminal cases.

In Chapter 11, Louis Michael Seidman explores a series of puzzles in Stuntz’s own exercise of discretion throughout his professional career: 1) that Stuntz did not explicitly refer to his deep Christian faith in his criminal justice writings, despite having insisted that “Christians should ‘come out of the closet’ and bring their Christian perspective to bear on legal problems.; 2) that Stuntz was exceedingly humble, yet insisted on the exclusive truth of Christianity; and 3) that Seidman himself is “an atheist/agnostic Jew” with very different political leanings, yet feels a “profound connection” to Stuntz and his work. Seidman rejects as implausible several possible solutions to these puzzles. While some might omit reference to their faith for strategic reasons or conclude that it is not relevant to their scholarly work. Stuntz would never have acted from strategic motives such as these, and he clearly believed that his faith and his work on criminal justice were related. While Stuntz’s personal humility might solve the first puzzle, it doesn’t explain the second. The answer to the second and third puzzles, Seidman suggests, must lie in our need to commit our lives to a principle or principles. In the content of this commitment, Seidman concludes, lies the connection that draws him so strongly to Stuntz.



In Chapter 12, “Justice and Mercy, or How I Learned to Love Discretion,” Carol Steiker notes that the dramatic change in American criminal justice have invariably assumed that “discretion is essentially problematic.” One of Bill’s Stuntz’s signal contributions was, “like the boy who questions the Emperor’s sartorial choices, [to point out] the naked truth that despite these innovations, American criminal justice in our new millennium is in many ways *more* arbitrary, discriminatory, and unbalanced in terms of power than before the advent of these discretion-cabining reforms.” In Steiker’s view, Stuntz “offered a more nuanced look at discretion – not by considering the discretionary power of individual institutional actors in isolation from each other, but rather by tracing the way that discretion shapes the relationship of institutional actors to one another. In doing so, he has modified many of the critiques of discretion and, indeed, suggested solutions based on *more* rather than *less* discretion.” Steiker concludes that, although Stuntz himself might not have seen his work in these terms, his insights into the relationship between justice and mercy are an irreplaceable resource for those who seeking to reconcile “mercy-granting power” with rule of law values, as Steiker herself does.

## Epilogue

The book concludes with Bill Stuntz’s own words. In “Three Underrated Explanations for the Punitive Turn,” he offers three promising but underexplored avenues for future criminal justice scholarship.