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

INTRODUCTION: Appreciating Bill Stuntz

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

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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

[1] See "A Celebration in Honor of William J. Stuntz," Harvard Law School, March 26-27, 2010, webcast of fourth session, available at http://www.law.harvard.edu/faculty/wstuntz/.

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 night 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 phrase 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.

But 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 co-author on a leading criminal 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.

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Stuntz made his scholarly debut with *Self-Incrimination and Excuse*, 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 like waiver, use immunity, and required production of documents.

In his second major article, *Waiving Rights in Criminal Procedure*,[2] 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 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.[3] On its face, that requirement is puzzling: legal standards are generally enforced *post hoc* for the

[2] 75 Va. L. Rev. 761 (1989).
[3] *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991).

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 notes that while magistrates can provide "neutral" oversight, so can *post hoc* reviewing judges—and 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 over-deterrence 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,[4] 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 counter-intuitive fashion, Stuntz explained how these rulings actually *benefitted* the class of persons whose rights were seemingly infringed. Because these 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

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

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.

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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. But 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 like personal autonomy. In *The Substantive Origins of Criminal Procedure*,[5] 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

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

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 Right's 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 like 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*.[6] 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 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, while 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,[7] 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

[6] *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995).
[7] *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

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.[8] 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 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.[9] 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

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[8] *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998).

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

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."[10]

Stuntz argued that *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."[11] 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.

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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 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

[10] 67 Geo. Wash. L. Rev. at 1285.
[11] 99 MICH. L. REV. at 977.

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,[12] Stuntz explained the phenomenon of overcriminalization as a product of institutional incentives rather than 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 towards 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 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.[13] 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

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[12] *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).
[13] William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781 (2006).

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 upon 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 Clinton as illustrations, he explained the folly of applying the same Fourth Amendment standards regardless of the severity of the alleged criminal behavior.[14] In the Simpson trial, the usual standard proved senselessly strict, forcing the prosecutors to concoct a dubious story about concern for Simpson's safety to secure admission of the bloody glove they discovered on his doorstep. Conversely, in the Clinton case, the courts should have imposed a higher standard of proof before issuing subpoenas to investigate the relatively trivial offense of lying to cover up sex.

[14] *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842 (2001).

Similarly, in an essay written in the wake of the 2001 terrorist attacks, Stuntz argued for a more flexible interpretation of the Fourth Amendment to deal with the new threat from terrorism.[15] For example, police ought to be able to search terrorist suspects on a lower threshold of suspicion, but with greater scrutiny of the nature of such interactions, especially with an eye for ferreting out coercion and violence. Likewise, Stuntz argued for greater law enforcement power to gather private information but with greater constraints placed on its public disclosure outside of criminal trials.

In his last decade, Stuntz also began writing more about law and the Christian faith that was central to his life. Although Christianity is a radical faith, Stuntz insisted in a 2003 article on Christian legal theory,[16] its radical implications may have more to do with how law is practiced—that it might entail treating all work as "an offering to God"—than with the law's content. Stuntz then outlined three possible implications for Christian thinking about the law itself. A radically Christian approach to the Bible's pervasive concern for justice for the poor might call Christian lawyers to somehow enter into their poor clients' distress. Stuntz was more critical of a second possibility, legal moralism, noting the dangers of undertaking moral crusades to criminalize vice or enshrine in law one's positions on culture war issues like abortion and gay rights. Stuntz thought that such efforts were often self-defeating, both because they tended to generate political backlash and because the selective enforcement of vice laws sometimes undermined the very norms that they were intended to bolster.[17] Third, he called for humility--an awareness of the fallibility of human intellect, which ought to make one humble in one's convictions and chary in the use of law to solve complicated problems.[18]

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Over the last decade of his career, Bill wrote increasingly for popular as well as scholarly audiences. He explained how President George W. Bush's appointments to the Supreme Court were like those of Harry S. Truman.[19] He explored the virtues of "soft policing" while cautioning that its methods often entailed greater invasions of individual privacy than traditional

[15] *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002).
[16] *Christian Legal Theory*, 116 HARV. L. REV. 707 (2003).
[17] *See also Self-Defeating Crimes*, 86 VA. L. REV. 1871 (2000).
[18] *See also Christianity and the (Modest) Rule of Law*, 8 U. PENN. J. CONST. L. 809 (2006).
[19] "The Truman Show," *The New Republic* (2005).

policing.[20] He called for increased federal funding of local law enforcement.[21] He supported the surge in Iraq, analogizing it to Ulysses S. Grant's summer-long siege of Robert E. Lee's army in Virginia in 1864, and he rejected the application of economic concepts, such as the fallacy of sunk costs, to war.[22] Bill believed that terrorism should be fought militarily rather than through criminal prosecutions.[23] In 2004 he rightly predicted that President George W. Bush would defeat challenger John Kerry and that Tom Daschle would become the first Senate majority leader in fifty years to lose his job.[24] He explained why people of faith should worry about public displays of religiosity both because of the risk that they might be perceived as exclusionary and because religion might become contaminated by the public sphere.[25] In a 2005 essay singled out by David Brooks in the *New York Times* as one of the finest essays of the year, Bill tried to bridge the gap between the academic left and the Christian right, exploring the possibility of finding common ground on issues such as abortion and aid to the poor.[26] He thought that Christians could teach academics about humility and academics teach Christians about the love of argument.[27] (Of course, he taught all of us about both.) He wrote about the gift of his faith and of the special gifts that God gave to those who suffered.[28]

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Bill also wrote with grace and insight about his physical pain and about the cancer that ultimately killed him. His pain, Bill explained, felt like "an alarm clock taped to one ear, with the volume turned up."[29] He was tired, always tired—"very, very tired."[30] He noted the agony for cancer patients of "living in between"—the chemo treatment, the remission, the cancer's return. [31] Nobody could tell how long that "between time" would last—"[m]y doctors don't

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[20] "Lessons from London: Why More Eavesdropping is Better than Less," *The New Republic* (2006).
[21] "No Cop Left Behind," *Boston Review* (2005).
[22] Iraq articles, *The Weekly Standard* (2006); 1864 Redux?, *TCS Daily* (2004)
[23] "Terrorism and the Mob," *TCS Daily* (2004).

[24] "Daschle May Lose," *TCS Daily* (2004); Why Truman Defeats Dewey, *TCS Daily* (2004)
[25] "Turning Faith into Elevator Music," *TCS Daily* (2005)
[26] "Academic Left and Christian Right," *TCS Daily* (2005)
[27] "Faculty Clubs and Church Pews," *TCS Daily* + widely distributed thereafter (2004)
[28] "Three Gifts for Hard Times," *Christian Today* (2009).

[29] *Less than the Least* blog, Nov. 20, 2008.
[30] Feb. 28, 2008.
[31] Aug. 3, 2008,

know, and God isn't talking."[32] How ought one to make plans when one doesn't know "how long it will be till the sand runs out?"[33]

Bill posted blog entries both as therapy for himself and "as a window into the world" of suffering for others; it was an "ugly world" but one that was home to so many people.[34] He noted how living with chronic pain and illness was like living "life in the closet"—"a secret world, a world my friends and loved ones cannot know—and, I pray, one they never will know."[35] Secrets seem shameful; sufferers worry that some failing of theirs, some character flaw, had left them to "inhabit this strange and terrible unseen place."[36] Bill hoped to open the closet door so that others could see inside.

Bill thought it possible to draw meaning from a life characterized by "weariness and pain [that] are everywhere."[37] He did not deny the ugliness of the pain that clung to him "like a stain that cannot be cleansed," but he rejoiced in the fact that God was not repulsed by the ugliness but instead "wrapped His arms around it" and sought to cleanse it.[38] Bill found humor in his drug treatment—for example, from a drug labeled "5-FU."[39] He came to appreciate the beauty of living in the moment, when one no longer assumes one will be around for the college graduation of one's children or the birth of one's grandchildren. Experiencing the beauty of the Charles River from his hospital bed brought a smile to his face. Though cancer and its treatment "are nasty businesses"—he would not pretend otherwise—he also found in them "benefits unimagined," especially the love and kindness of his friends and family.[40] Though cancer was "a supremely ugly disease," he found its treatment sometimes "a kind of beauty," as when he watched nurses and doctors in the cancer unit treat a teenage victim with kindness and compassion.[41]

Managing the pain and the side effects of the cancer drugs required nearly all of the mental concentration that Bill could summon. Characteristically, he worried that between the

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[32] Aug. 3, 2008.
[33] Aug. 3, 2008.
[34] Feb. 28, 2008.
[35] Nov. 20, 2008.
[36] Nov. 20, 2008.
[37] Feb. 28, 2008.
[38] March 2, 2008.
[39] Nov. 20, 2008.
[40] Sept. 19, 2008.
[41] June 28, 2010.

pain, nausea, and fatigue, he could no longer teach or write effectively. Yet just three months before he died, Bill finished both his book manuscript and his last semester of teaching.

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In the fall of 2011, Harvard University Press published Bill's last scholarly work, *The Collapse of American Criminal Justice*. This book is a fitting capstone to his career and brings together many of the themes that preoccupied his scholarly life. Thankfully, Bill lived long enough to complete his magnum opus; tragically, he did not survive to enjoy the plaudits that it is certain to receive. We think that it is one of the best books ever written about the law.

In the book, Stuntz traces the history of the American criminal justice system in search of explanations for our current conundrum—a massive incarceration rate, strongly correlated with race. We have reached a place, he claimed, where our system more closely resembles that of the Soviet gulag than of the rest of the western world with which America is ordinarily compared. How could this have happened?

For Stuntz, our current morass called to mind Jefferson's famous metaphor for the dilemma faced by antebellum slave holders, who held the "wolf by the ears": How could they emancipate millions of blacks from slavery without igniting deadly violence against their former masters? Modern day Americans, Stuntz believed, saw themselves facing a similar quandary: how could they end mass incarceration without liberating hundreds of thousands of prisoners whose return to the streets would likely restore the horrific crime rates of the 1970s and 1980s? Stuntz argued that much as southern slave owners misconceived the consequences of emancipation, so too, many Americans today misunderstand the relationship between mass incarceration and crime rates.

The book centers on Stuntz's observations regarding the peculiar relationship between crime rates and incarceration rates over the last 50 years. In the 1950s and 1960s, the United States experienced enormous increases in the rate of violent crime—in some cities, murder rates increased more than ten-fold—while incarceration rates in some states simultaneously declined by as much as 30 to 40 percent. Over the following few decades, incarceration rates increased exponentially—in some states, by as much as seven or eight fold—while crime rates first continued to rise and then began to fall, albeit very slowly. American prisons and jails that housed fewer than 200,000 inmates during the early years of Nixon's presidency held more than

1.5 million at the beginning of Obama's. Seventy percent of black American males who failed to graduate from high school will be incarcerated during their lifetimes. Such mass incarceration not only decimates minority communities but also undermines the legitimacy of the criminal justice system in the minds of those who are so disproportionately victimized by it.

Stuntz blamed much of this predicament on the Warren Court's ill-timed criminal procedure revolution. By erecting procedural impediments to the punishment of violent crime in the midst of growing public panic about a crime epidemic, the Court ensured a political backlash, which nationalized the crime issue, launched a tsunami of retributivism in criminal punishment, and inspired legislatures to respond in ways that produced assembly-line justice, which poorly sorts the innocent from the guilty.

Always the hopeful reformer, Stuntz offered recommendations for escaping our current predicament. First, he urged a return to the sort of localized, relatively nonpunitive criminal justice system that characterized northern cities in the late nineteenth century. This was a system in which the same ethnic minorities that constituted the bulk of the criminal population also made the relevant decisions—in local politics, as local police officers and prosecutors, and as jurors—that determined how many of their ethnic compatriots to incarcerate. Today, by contrast, many of the decisions that send young black and Latino men to jail in extraordinary numbers are made by government officials relatively unaccountable to local politics—national and state legislators, unelected federal prosecutors, and state's attorneys elected at the county level (which often mix more powerful white suburbs with disempowered minority urban cores). Stuntz also advocated returning to a regime in which judges have discretion to interpret criminal statutes to do justice and in which juries, rendered largely irrelevant by plea bargaining, can use their power to nullify unfair prosecutions. The constitutional law of criminal justice, Stuntz urged, should focus less on procedural protections that benefit mostly the guilty and more on substantive constraints that curb overcriminalization, curtail racially disparate punishments, and require that criminal statutes be enforced consistently or not at all. Invoking social science studies that show that more policing is a better way to fight crime than more incarceration, Stuntz applauded experiments in community policing, which can effectively deter crime, while enhancing the legitimacy of law enforcement in the neighborhoods that it targets.

The Collapse of American Criminal Justice is breathtaking in its historical scope and its analytical insight. Stuntz treats his readers to an account of the contrasting procedural/substantive styles of the American Bill of Rights and the French Declaration of Rights, and he traces the historical roots of the Bill of Rights' criminal procedure guarantees to substantive concerns about political and religious persecution in Great Britain during the seventeenth and eighteenth centuries. Stuntz explores the contrasting criminal justice systems of the Jim Crow South and the urban, immigrant-dominated cities of the Northeast. He explains the growing involvement of the federal government in the suppression of vice—lotteries, prostitution, the opium trade—in the early twentieth century, and he notes the ways in which Prohibition's enforcement in the 1920s was much more defensible than our modern War on Drugs. He offers an account of how mid-twentieth century politicians such as Thomas Dewey, Estes Kefauver, and Robert Kennedy became expert practitioners of the symbolic politics of crime and of how the political backlash generated by the Warren Court's criminal procedure revolution led liberal Democrats and conservative Republicans into bidding wars to demonstrate their relative toughness on crime. Readers will come away from *The Collapse of American Criminal Justice* not only with a richer understanding of our mass incarceration society and its history but also with a sense of awe at the author's learning, breadth of understanding, creative capacity, and moral vision.

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Stuntzian perspectives have transformed our understanding of the criminal justice system. Today almost everyone working in the field appreciates the interrelationship between criminal law and criminal procedure. Although debate about the Warren Court's criminal procedure revolution continues, few modern observers would deny that it produced unintended and, sometimes, perverse consequences. Whether or not they embrace Stuntz's conclusions, most modern scholars agree that criminal justice should be understood as a complex system with interrelated parts and a distinctive political economy. It is hard to believe that none of these propositions had been established before Bill turned his attention to criminal justice.

The contributors to this volume are diverse in nearly every respect except one: Each is a leading scholar of criminal justice who has been influenced by Bill Stuntz and his scholarship.

The disparate ways in which they have been influenced is itself a testament to the scope and richness of Bill's academic contributions.

This book is divided into three major parts, which represent three principal strands in Stuntz's work. The essays in Part I address the political economy of substantive criminal law. Part II considers issues arising in the context of police investigations. The principal concern in Part III is the role of discretion and emotion in criminal justice. In a brief concluding essay, Stuntz himself suggests possible avenues for future scholarship.

Part I: The Political Economy of Substantive Criminal Law

This part begins with an essay, "Political Dysfunction and the Machinery of Capital Punishment," written by Joe Hoffmann, whose friendship with Stuntz spans a quarter century to when Hoffmann was clerking for then-Associate Justice William Rehnquist at the same time Stuntz was clerking for Justice Lewis Powell. Here, Hoffmann describes the new path toward death penalty abolition recently taken in Illinois. "Virtual abolition" (or "I've fallen and I can't get up" abolition) occurs when the death penalty temporarily gets off track for some reason, and a particular type of political dynamic prevents it from regaining its footing. As an example of this political dynamic, Hoffmann recounts the fate of a bill introduced in the Illinois legislature in 2005 that would have required, as a condition for imposing capital punishment, that the fact finder certify "no doubt"—as opposed to simply "proof beyond a reasonable doubt"—of the defendant's factual guilt. This bill was soundly defeated by the combined efforts of capital punishment supporters, who viewed it as a disingenuous effort to abolish the death penalty, and capital punishment opponents, who feared that it would legitimize the death penalty. The recurring political failure of such reform efforts can lead to virtual abolition—as it did in Illinois from 2000 to 2011—without the need for any judge, governor, or legislator to take the politically risky step of opposing capital punishment. And it can eventually make actual abolition a foregone conclusion.

More than twenty-five years ago, Richard McAdams, the author of chapter two, inherited not only Bill Stuntz's desk at the *Virginia Law Review* but also the decaying leftover pizza slices still inhabiting it. In "Bill Stuntz and the Principal-Agent Problem in American Criminal Law," McAdams credits Stuntz with pioneering the analysis of criminal law in terms of agency costs. Corporate law scholars are familiar with the problems that arise when ownership and control of a

business firm are separated, but few scholars before Stuntz thought about criminal law in such terms, even though agency problems are arguably even more prevalent in this sphere. Avoiding confusing jargon, Stuntz explained how multiple agents—legislators, prosecutors, police, judges, jurors, defense lawyers—interact to produce the complex system of criminal justice that we know today. McAdams explains how agency problems underlie many of the pathologies that Stuntz identifies in the system: legislative overcriminalization, unequal enforcement of vice crimes, and the explosion of plea bargaining.

In "Overcriminalization for Lack of Better Options," Danny Richman, who also first met Stuntz during a Supreme Court clerkship in 1985-86, explores a previously unexplored facet of the overcriminalization phenomenon: the "demand side." Richman directs our attention to the interest groups that lobby for the use of criminal law to regulate issues that might have been better addressed by civil law. These interest groups are attracted to the criminal law because criminal prosecutors tend to be better funded than other administrative officials and because criminal enforcement has greater cache. He also notes how opponents of regulation have often embraced criminalization as a means of avoiding the creation of new regulatory apparatuses. While there is no simple solution to these incentives to overcriminalize, Richman calls for an increased focus on noncriminal institutions and sanctions as tools of regulation.

In "Stealing Bill Stuntz," David Sklansky, yet another colleague of Bill's from Supreme Court clerkship days,[42] imagines Stuntz as our new Charles Dickens. Just as all political camps sought to claim Dickens as an ally, so, too, has Stuntz been embraced by everyone from Burkean conservatives to radical critical race theorists. Sklansky attributes Stuntz's broad appeal to three themes that pervade his scholarship. First, criminal justice is a complex system with interrelated parts. This theme reveals Stuntz's scholarly commitment to understanding the real world in all its complexity, and it induced a certain humility in his scholarship, though not a fatalistic paralysis. Second, the criminal justice system has its own distinctive political economy. This theme relates to Stuntz's pragmatism and puts him at odds with other theoretical approaches, such as originalism and expressivism, which are less focused upon devising rules that promote social welfare. Third, Stuntz's scholarship evinces concern with improving the lot of the least advantaged participants in the system, especially racial minorities. This commitment led Stuntz

[42] Some have wondered why such a large percentage of the leading scholars in Criminal Justice today started their careers as Supreme Court law clerks in 1985-86. Perhaps Bill Stuntz's influence rubbed off from an early age?

to focus on the need for greater empathy, which, he thought, would be promoted by more local democracy. From Stuntz's work and life, Sklansky draws two broad lessons. First, much as Stuntz himself bridged the divide between religious and secular communities, people of diverse views should be able to reason about divisive issues of criminal justice in respectful and constructive ways. Second, even though Stuntz himself thought that criminal law's pathologies resulted from the impersonal mechanics of public-choice theory, his career demonstrates the importance of personal leadership, idealism, and decency.

Part II: Police Investigation

The essays in Part II focus on issues arising from police investigation. In "What the Police Do," Anne Coughlin, Bill's co-clerk in Justice Powell's chambers in 1985-86, analogizes police interrogation to seduction and rape, thereby combining insights drawn from both criminal law and criminal procedure in good Stuntzian fashion. The law of both rape and confession emphasize the importance of distinguishing consent from coercion; both tolerate fraud but not violence; both involve activity usually conducted in private; both are usually zero-sum games; and both often involve strangers using power against their victims. Coughlin provocatively asks why the law of criminal interrogation treats men, who dominate the pool of criminal suspects, as if they were women, who dominate the pool of rape victims.

In "The Distribution of Dignity and the Fourth Amendment," Tracey Meares explores constitutional regulation of police searches and seizures. Meares's earlier work in this area, which drew upon Stuntzian concerns regarding distributional justice, argued that courts should evaluate search-and-seizure tactics based on whether the community adopting them had internalized the relevant costs. In this chapter, Meares emphasizes "evenhandness" and investigates how that concept relates to the Fourth Amendment requirement of individualized suspicion. In her view, randomized procedures conducted without reasonable suspicion, such as sobriety checkpoints, are praiseworthy, both because they avoid racial profiling and because they encourage encounters that respect the dignity of those who are targeted.

In "Why Courts Should Not Quantify Probable Cause," Orin Kerr rejects the notion that courts should attempt to quantify the meaning of the Fourth Amendment's "probable cause" requirement. Kerr observes that affidavits filed by police officers in support of search warrants

generally fail to inform the magistrate about investigative techniques that have been tried but failed to produce incriminating evidence and about those that were not tried at all. Kerr worries that quantitative standards, because they implicate powerful cognitive biases, would divert judges from attending to this omitted information and thus generate less accurate results than standards that simply encourage judges to rely on their intuitive "situation sense."

In "DNA and the Fifth Amendment," Erin Murphy explores whether the privilege against self-incrimination should forbid law enforcement agencies from amassing large scale DNA databases through the mandatory sampling of convicted persons or arrestees. So far, critics of mandatory DNA testing have been discouraged from deploying Fifth Amendment arguments because of the Supreme Court's decision in *Schmerber v. California* (1966), which rejected a Fifth Amendment challenge to compelling a suspect to provide a blood sample. Murphy imagines reading *Schmerber* through the lens of the Court's recent expansion of Fifth Amendment rights in the context of compelled production of documents—an expansion accurately forecast by Stuntz himself in his first law review article. Murphy likens the "testimonial" production of documents to the compulsion to provide a DNA sample in the absence of any individualized suspicion. Yet she admits to being troubled by two claims that are themselves Stuntzian in origin. First, DNA sampling does not expose suspects to the "cruel trilemma" of perjury, self-incrimination, or contempt. Second, even if police and prosecutors are prevented from coercively obtaining DNA samples, they may still resort to alternative means of securing them, such as offering criminal defendants lighter sentences in exchange for a DNA sample. Nonetheless, she concludes on Stuntzian distributional grounds that, at the very least, the Fifth Amendment case against coercively obtaining DNA samples from criminal suspects deserves another look.

Part III: Emotion, Discretion, and the Judicial Role

The essays in the book's final part focus upon two related concepts that are sometimes thought to be in tension with the rule of law – emotion and discretion. Bill thought that both were important, and his later work, especially on the distributional consequences of our criminal justice system, spelled out why.

In Chapter 9, Dan Kahan identifies and analyzes two different conceptions of emotion in criminal law: a *mechanistic* one that conceives of emotions as thoughtless, nonvolitional forces,

and an *evaluative* one that understands them as thought-pervaded moral assessments. Kahan accepts this distinction but rejects the prevalent view of the evaluative conception as implicating a decision maker's self-conscious moral evaluation. Rather, Kahan sees evaluation as emanating from cultural frameworks that unconsciously shape the intensity of emotions and other facts that generally fall within the mechanistic conception of emotion. For Kahan, this insight explains why decision makers believe they are assessing emotions mechanistically when, in fact, they are morally evaluating them.

Andrew Leipold, one of Bill's successors both at the *Virginia Law Review* and in Justice Powell's chambers, is the author of "Patrolling the Fenceline: How the Court Only Sometimes Cares About Preserving its Role in Criminal Cases." Leipold explores the extent to which the recent Supreme Court has been consistent in preserving a robust role for judges and juries in criminal cases. In three important lines of cases, the Court has aggressively protected this authority from prosecutorial overreaching. It has restored some of judges' traditional power over sentencing, asserted judicial control over terrorism cases, and ensured that courtroom testimony is subject to adequate cross-examination. But two other recent decisions seem to depart from this pattern. In *United States v. Ruiz*, the Court refused to overturn a guilty plea where the defendant claimed that the prosecutor improperly failed to turn over favorable evidence in its files (so-called "Brady" material) before the plea was made, evidence the government would have been obligated to disclose had the case gone to trial. In *United States v. Cotton*, the Court ruled that the government's failure to allege the elements of a crime in an indictment did not automatically deprive the federal courts of jurisdiction over the case. In these cases, Leipold argues, the Court failed to explain its deference to executive branch conduct of criminal prosecutions. The Court's unwillingness closely to superintend the plea bargaining process is especially troubling, Leipold notes, because plea bargaining is, as Stuntz himself observed, "not some adjunct to the criminal justice system; it *is* the criminal justice system."

In "Three Puzzles in the Work of Bill Stuntz," Mike Seidman explores a series of puzzles regarding the way Stuntz exercised his own authorial discretion throughout his professional career. First, given Stuntz's call for Christians to "come out of the closet" and openly bring their Christian perspective to bear on legal problems, why did Stuntz almost never refer to his own deep Christian beliefs in his criminal justice writings? Second, how can someone be as humble as Stuntz yet simultaneously be so certain of the exclusive truth of

Christianity? Third, how can an "atheist/agonistic Jew" like Seidman, with very different political leanings than Stuntz, feel such a "profound connection" to the man and his work? Stuntz's personal humility may solve the first puzzle: a humble Christian might well be reluctant to parade his religious views in public scholarship. The answer to the other puzzles, Seidman argues, lies in the inevitability of unconstrained choice in what Seidman thinks is a "meaningless universe": Stuntz chooses to embrace Christianity, Seidman agnosticism and communitarianism. But neither can avoid making choices grounded less in reason than in faith.

In "The Mercy Seat: Discretion, Justice, and Mercy in the American Criminal Justice System," Carol Steiker explores the role that the concept of "mercy" might play in promoting reform of the criminal justice system. Steiker, one of Bill's colleagues at Harvard and his successor as the Henry J. Friendly Professor of Law, describes how the religious concept of God's mercy might give rise to a human counterpart in criminal justice. Like Seidman, Steiker notes Stuntz's avoidance of religious imagery in his own work, but she explains how Stuntz's thoughts on both criminal justice and Christianity might contribute to the development of a human-scale conception of mercy. Steiker observes that conventional wisdom has deemed discretion within the criminal justice system an evil to be rooted out. One of Stuntz's signal contributions, she argues, has been to show that discretion-cabining reforms have often made the system *more* arbitrary and discriminatory. Counterintuitively, the solution to too much discretion may actually be more discretion, of a type best described as "mercy." Stuntz's work, Steiker concludes, sheds valuable light on how one might reconcile a revival of discretionary mercy with rule-of-law justice.

Epilogue

The volume concludes with Bill Stuntz's own words. In "Three Underrated Explanations for the Punitive Turn," he suggests promising avenues for future criminal justice scholarship. First, Stuntz urges further study and reform of the relationship between state and local governments in criminal justice: because prison is essentially a "free" good to local law enforcement (because it is paid for at the state rather than local level), local prosecutors have tended to vastly overuse it. Second, he urges further study of the divergence between the choices made by local police and by local prosecutors: in recent decades, police arrest rates have tended

to rise and fall with changing crime rates, but prosecutions and prison sentences have fluctuated far less predictably. Finally, Stuntz argues that criminal law reformers have focused too much on technical codification and too little on ensuring that only people with culpable mental states get punished. Stuntz notes that none of the three developments he criticizes were ideologically motivated or intended to produce the mass incarceration that they did. For this reason, he is characteristically hopeful that a nonideological solution to our mass incarceration problem can be found.

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Bill Stuntz transformed the field of criminal justice scholarship over the past quarter century. He bridged the gap between criminal law and criminal procedure; he taught us to think about criminal justice as a system with interconnected parts and a distinctive political economy; he shed light on current conundrums through the use of history; he illuminated the unintended and often deleterious consequences of the Warren Court's revolution in criminal procedure; and he proposed possible escape routes from our current predicament of mass incarceration, which destroys lives, devastates minority urban communities, and delegitimizes the legal system that produces it.

But Bill Stuntz did not merely enlighten us with his brilliant scholarship. He was also our colleague, our friend, our trusted advisor, and our inspiration.

Bill was a fabulous classroom law teacher. From his first days at Virginia, students adored him. He was a master of the material; he was comfortable at the podium; he was brilliant; he was funny; he was excited by and appreciative of student contributions; and he engaged and stretched their minds. Bill was also extraordinarily accessible to students: He never set office hours because he was always in the office and was happy to talk with students whenever they dropped by, and for as long as they wished.

Bill was also the best colleague and friend we could imagine having. He was curious, knowledgeable, generous with his time, fun to talk to, and the consummate team player. He read our scholarship with a meticulous eye, and his comments were always invaluable: detailed, incisive, constructive, encouraging. He performed this service not only for us, but for an entire generation of criminal procedure (and other) scholars across the country. Stuntz was the Bill Russell of legal academia: He helped make all of his teammates—as well as his "competitors"—the best that they could be.

Bill was an extraordinary institutional citizen. He served on appointments committees at Virginia and Harvard more than half of his years as a tenured professor, and he was widely esteemed for his discernment and judgment. Countless colleagues, junior and senior, sought out his counsel with regard to their teaching, their scholarship, their professional careers, and their personal lives. Bob Scott, Bill's dean at Virginia, groomed Bill to be his successor as dean—an appointment that would have been greeted with acclamation by the Virginia faculty had Bill been interested in the job, and Elena Kagan, his dean at Harvard, later called him "the dean's pet." A decade after Bill moved to Harvard, a former dean called him the most important person on the faculty.

Bill was also a wonderful friend. He was kind, considerate, sincere, dependable, cheerful, and self-deprecating. (One of the favorite jokes about Bill among his friends and colleagues involves recollections of the many times that he dropped by their offices; shed pearls of wisdom about law, politics, sports, and life; then apologized profusely for taking up so much of their time.) In twenty-five years, we rarely heard Bill say an unkind word about another person, nor can we recall anyone else saying anything unkind about Bill.

Last but not least, Bill taught us the important lesson—especially vital to recall in today's fiercely polarized political culture—that people who do not see eye to eye politically can still respect, admire, and cherish one another. We sometimes—two of us, often-- disagreed with Bill about which candidate to support for public office, but political disagreement never got in the way of a deeper sense of connection. Nobody who knew him could ever question Bill's integrity, his good will, and his compassion for the least advantaged in our society. Through his example, he taught us that political disagreements are often about means rather than ends, and that more is to be gained by empathizing with and understanding our political opponents than by demonizing them.

Bill's legacy will live on for decades through his scholarship and in the hearts and minds of thousands of students and scores of colleagues. We believe that he was one of the greatest law professors of his generation, as well as one of the most beloved. It is our privilege and our pleasure to present this volume of essays, testifying to his influence and dedicated to his memory.

Michael Klarman

David Skeel

Carol Steiker