

2011

## In Memoriam: William J. Stuntz

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### Recommended Citation

Pamela S. Karlan, Michael J. Klarman, Martha Minow, Daniel C. Richman, Robert E. Scott, David Skeel & Carol Steiker, *In Memoriam: William J. Stuntz*, 124 HARV. L. REV. 1849 (2011).  
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HARVARD LAW REVIEW

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## IN MEMORIAM: WILLIAM J. STUNTZ

The editors of the *Harvard Law Review* respectfully dedicate this issue to Professor William J. Stuntz.

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*Pamela S. Karlan\**

In October Term 1985, I met two extraordinary men who changed my life: Harry Blackmun (for whom I clerked) and Bill Stuntz (who was clerking for Justice Powell in the chambers next door). They were connected by the combination of a passion for justice, a profound impact on the law, a deep religious faith accompanied (probably not coincidentally) by an almost disquieting humility, and a rare gift for friendship and celebrating others' good fortune. And now yet another connection: the *Harvard Law Review* has given me a chance to celebrate each of them.<sup>1</sup>

There's one more tie, hardly surprising in two men so interested in American history, statistics, and rules: they were great baseball fans. With Bill, it wasn't just the games: the short walk over to the University of Virginia's field (where we once saw a triple play and, much to Bill's dismay, always heard the ping of the metal bats) or the long lazy drives to Lynchburg for Carolina League matchups (where we marked Bill's birthday with a night in the emergency room after our colleague John Harrison was hit by a line drive); it was the *conversations*. As with criminal procedure and criminal law, Bill had an encyclopedic knowledge. I still remember the afternoon a group of us tried to come up with the career home runs leader for each letter of the alphabet.

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<sup>1</sup> See Pamela S. Karlan, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 13 (1994); Pamela S. Karlan, *In Memoriam: Harry A. Blackmun*, 113 HARV. L. REV. 5 (1999).

Back then, it was Hank Aaron, Ernie Banks . . . Carl Yastrzemski, Gus Zernial.<sup>2</sup> Only Bill knew — indeed, had heard of — Zernial.

That was a more innocent time, and of course the effervescent Banks has been passed by the sullen Barry Bonds. Several years ago, when Bill's back pain had flared up, I sent him a sympathetic email. I asked whether he remembered Bill James's power/speed number, which is calculated by multiplying a player's stolen bases by his home runs, doubling the product, and dividing it by the sum of stolen bases plus home runs.<sup>3</sup> The number measures excellence and balance across several dimensions. It's the generalized formula for things like the 30/30 club — which sounds more interesting than it is — whose most significant repeat players were the Bondses, father and son. I suggested to Bill that he had to be near the top of the law professor virtue/suffering number.

Bill replied with his characteristic good humor mixed with an edge: "I'm thrilled," he wrote, "to be mentioned in the vicinity of Barry Bonds, though I would have thought the main thing we have in common is Schedule II controlled substances."<sup>4</sup>

But there are other baseball players with whom Bill had far more in common. At the Festschrift Harvard Law School held for Bill last spring, I surveyed the field, dismissing various possibilities — Sandy Koufax (strong religious principles but the wrong Testament); Mark Teixeira (also a notable Annapolis native, but a Yankee); and Mark Belanger (dark, skinny, and lacking discernible musculature, but famous for being defensive, which Bill never was).

Perhaps, though, I dismissed Cal Ripken too quickly. Ripken remade what it meant to be a shortstop. His arm was so strong that he could set up deeper in the field, which enabled him to make more plays. But precisely because he played so deep, he made it look easy: people sometimes didn't appreciate Ripken's fielding because he never had to dive to get to the ball. The same was true of Bill. He had one of the best arms in the legal academy. Those of us who came to constitutional criminal procedure or the political economy of criminal law after Bill may not recognize how much he remade the field, writing things that — once he said them — seemed self-evident, but that only a man with his gifts could have perceived at first.

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<sup>2</sup> See TOTAL BASEBALL 2270 (John Thorn & Pete Palmer eds., 4th ed. 1995) (giving the overall career home run leaders); *id.* at 1404 (giving the statistics for Zernial). Inspired and too often bested in debates with Bill, I bought my own copy.

<sup>3</sup> See BILL JAMES, THE BILL JAMES BASEBALL ABSTRACT 1987, at 27 (1987). I inherited Justice Blackmun's copy of James's *Historical Baseball Abstract* and later gave a copy of the revised edition to Bill signed by the audience at the Harvard Law School's celebration of his career. See BILL JAMES, THE NEW BILL JAMES HISTORICAL BASEBALL ABSTRACT (2001).

<sup>4</sup> Email from Bill Stuntz to author (Feb. 15, 2004) (on file with the Harvard Law School Library).

But ultimately, I arrived at Pee Wee Reese, the great Brooklyn shortstop. Reese's career has many impressive highlights, but he will be remembered — as will Bill — for the grace and human decency with which he handled the most vexing issue in our national history, the question of race. Reese was the Dodgers' captain the year Jackie Robinson joined the team. There was nothing in Reese's background to suggest a passion for equality; he once said that Robinson was the first black man with whom he had ever shaken hands. But when Robinson was being heckled by fans in Cincinnati during an early road trip, Reese went over to Robinson, engaged him in conversation, and put his arm around Robinson's shoulder in a gesture of support that silenced the crowd. Like Reese, Bill had a gift for friendships with people very different from himself along nearly every dimension. And his passion for equality and justice shines through his great life's work, the magisterial *The Collapse of American Criminal Justice*.<sup>5</sup>

Bill used a passage from *The Merchant of Venice* as the epigraph to the final chapter of that final work:

The quality of mercy is not strain'd,  
It droppeth as the gentle rain from heaven  
Upon the place beneath: It is twice blest;  
It blesseth him that gives and him that takes . . .<sup>6</sup>

Bill always acted as if *he* were the one who had been blessed. And in many, many ways he was: a devoted and loving family, faith that stayed with him through good times and bad, a wonderful career in which he transformed a core area of legal doctrine, a legion of admiring students and colleagues, and even a set of World Championships — for the Orioles when he was a Baltimore fan and for the Red Sox when he moved his loyalties northwards. But actually, it is we who have been blessed to have a colleague and friend like him. Or as Jim Bouton put it: “You see, you spend a good piece of your life gripping a baseball and in the end it turns out that it was the other way around all the time.”<sup>7</sup>

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<sup>5</sup> WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (forthcoming 2011).

<sup>6</sup> WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act IV, sc. 1, ll. 184–87 (1596).

<sup>7</sup> JIM BOUTON, *BALL FOUR* 398 (20th anniversary ed. 1990).

*Michael J. Klarman\**

Bill Stuntz was, to borrow a baseball analogy, the ultimate five-tool law professor: he was an inspiring teacher, a pathbreaking scholar, a fabulous colleague, an extraordinary institutional citizen, and an outstanding person.

I began my teaching career at the University of Virginia School of Law in 1987, one year after Bill Stuntz joined the faculty. It was one of the most fortunate things that ever happened to me, though things almost turned out rather differently: Bill nearly got us killed while driving to my recruitment dinner in the fall of 1986. Bill was a terrible driver. (Operating a motor vehicle is apparently not among the five tools required to excel either at baseball or law teaching.) To compound his driving deficiencies, Bill already was exhibiting keen nervousness about making tenure, just months into his teaching career. This was one of the great jokes among junior faculty at Virginia in the late 1980s: if Bill Stuntz was anxious about getting tenure, what did that portend for the rest of us mere mortals?

Both Bill and I taught Criminal Law for the first time in the fall of 1987. Literally on a daily basis, we discussed our game plans for class. From these conversations, I learned not only a great deal about substantive criminal law, but also about how to teach. Bill was a huge success in the classroom right from the start. He was a master of the material; he was comfortable at the podium; he was brilliant; he was funny; he was appreciative of student comments; and he engaged and stretched students' minds. Bill was also accessible to students in a way I have never seen duplicated by another law professor. He never set office hours, but he was in the office virtually all of the time, and he would talk to students whenever they dropped by, and for as long as they wanted. Bill took their ideas seriously, gave them encouragement, and, for many, helped to launch their own academic careers.

Bill's scholarship has redefined the fields of Criminal Procedure and Criminal Justice. For the last quarter century, he wrote roughly one pioneering article a year — clarifying and transforming our understanding of the exclusionary rule, the privilege against self-incrimination, plea bargaining, the uneasy relationship between criminal procedure and criminal justice, the political economy of the criminal justice system, and so much more. Much of his scholarship applied the tools of law and economics — incentive effects, agency costs, bargaining theory, unintended consequences — to a field that rarely had been analyzed in such terms. But what most distinguished Bill's scholarship was its eclecticism: he used the tools of legal doctrine, history,

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criminology, political science, sociology, and empirical studies to provide a richly textured analysis of the criminal justice system. Virtually everyone writing in the field today acknowledges — quite happily — the intellectual debt they owe to Bill. His many years of scholarly contributions recently culminated in a soon-to-be published book about the history of American criminal procedure and criminal justice, which may well be the best book about law I have ever read.

Moreover, Bill's scholarship served as an example to his colleagues — both at Virginia and at Harvard — of what legal scholarship should be: insightful, creative, rigorous, engaging. The standard of excellence he set in his own work was a model to emulate for an entire generation of junior faculty, who saw their intellectual ambitions stretched in ways they could not otherwise have imagined.

Bill was not only the best colleague I have ever had, he was the best colleague I could ever imagine having. He was curious, knowledgeable, generous with his time, fun to talk to, and the consummate team player. For the first fifteen years of my career, he read virtually every word I wrote, and his comments were always invaluable: detailed, incisive, constructive, encouraging. I would bet that during the late 1980s and early 1990s, Bill Stuntz is thanked in the star footnote of more than half the law review articles published by Virginia faculty. For most of those articles, moreover, Bill requested the manuscript from the author, rather than the author soliciting his comments. He was the glue that held Virginia together from 1986 to 2000, and he played a similar role at Harvard over the past decade. If I may be forgiven for shifting sports analogies, Bill Stuntz was the Bill Russell of legal academia: he helped make all of his teammates the best that they could be. Unlike Russell, however, Stuntz also sought to make his "competitors" better. Virtually every leading criminal procedure scholar in the country who is Bill's age or younger has stories to tell about Bill's extraordinary generosity of spirit: he helped them to improve their scholarship, encouraged their development, and promoted their careers.

Bill was an institutional leader from the get-go. He was made chair of the Virginia appointments committee the year after he earned tenure — an extraordinary testament to his colleagues' faith in his good judgment, maturity, and intellectual abilities. I would bet that in the twenty years since then, Bill served on Virginia and Harvard appointments committees more than half of the time. Countless colleagues — junior and senior — went to him for advice: about their scholarship, their teaching, their careers, their lives. Former Virginia dean Bob Scott groomed Bill to be his successor — an appointment that would have been greeted with acclamation by the faculty — but Bill was not interested. I have heard a former Harvard dean refer to Bill as the most important person on the faculty over the past decade.

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Last but not least, Bill was an outstanding human being and a warm and generous 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, or sports; then apologized profusely for taking up so much of their time.) In twenty-five years, I honestly cannot recall Bill ever saying an unkind word about another human being, nor can I remember anyone else saying anything unkind about Bill.

Yet, I think the most important lesson I learned from Bill Stuntz (leaving aside the many lessons about baseball that he thought he taught me) is that people who do not see eye to eye politically can still respect, admire, and cherish one another. In our increasingly polarized culture, people of all political stripes are too quick to vilify those with whom they disagree. Yet it was impossible for anyone to dislike Bill simply because of political disagreements. Nobody who knew him could ever question his integrity, his good will, his compassion for the least advantaged in our society. Through his example, he taught that political disagreements often are about means rather than ends, and that one should try to understand and empathize with those with whom one disagrees, rather than to demonize them. I cannot count the number of people I have told about this important lesson and from whom I learned it.

Bill's legacy will live on for decades in the hearts and minds of thousands of students and scores of colleagues. I believe that he was the greatest law professor of his generation.

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*Martha Minow\**

Nobel Prize-winning physicist Steven Weinberg once said, "The effort to understand the universe is one of the very few things that lifts human life a little above the level of farce, and gives it some of the grace of tragedy."<sup>1</sup>

No one made more or better efforts to understand the universe of criminal law and criminal justice than did Professor William Stuntz; in so doing, he lifted the sights of readers while challenging us to see better and do better.

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<sup>1</sup> STEVEN WEINBERG, *THE FIRST THREE MINUTES* 155 (1993).



There are two elements of Bill's personality that warrant mention, right from the start: first was his uncanny modesty, admirable anywhere, but simply a rarity in the law school world. The second was his irrepressible honesty. I loved seeing the two traits together. Hence, on his webpage that listed his areas for supervising student work and responding to press queries, he wrote, simply, "All aspects of criminal justice system."<sup>2</sup>

In friends, collaborators, and colleagues, Bill brought together prosecutor types and public defender types; Southerners and Northerners; bloggers and joggers; Red Sox fans and everyone else.

Bill lifted up crucial issues and approaches throughout his distinguished career. It is not enough, he taught us, to suggest that American criminal justice punishes too severely. Yes, dysfunctional politics and personal and systemic biases in prosecution and incarceration produce a criminal justice system that disproportionately affects blacks and Hispanics. But those explanations do not account for the wild swings from the lenient to the excessively punitive in criminal sanctions. Nor do those factors sufficiently address the underprotection of blacks and Hispanics through criminal law.

Bill's work emphasizes that the pathologies of the system stem not merely from the abuse of minorities by electoral majorities, but also from the more pernicious and subtle incentives affecting the interactions of prosecutors, legislators, and judges. In his words,

As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long. The end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys' offices and police departments. . . . In a criminal justice system that incarcerates two million people, criminal law is becoming a sideshow. It seems like, and is, an unhealthy state of affairs.<sup>3</sup>

Bill's reminder to us, always, is to address the political economy of criminal justice; he also brought to all of his work his personal wisdom about emotion and mercy. I want to suggest one more theme that permeates the work of Bill Stuntz, and that is the theme of grace.

I don't mean grace as the brand name of Caribbean cuisine, as established in 1922,<sup>4</sup> nor a song on the fourth album of the Britpop band Supergrass.<sup>5</sup> Closer to what I mean is the dictionary's reference to

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<sup>2</sup> William J. Stuntz, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/faculty/directory/index.html?id=95> (last visited May 5, 2011).

<sup>3</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001).

<sup>4</sup> GRACE, <http://www.gracefoods.com/> (last visited May 5, 2011).

<sup>5</sup> SUPERGRASS, *Grace, on LIFE ON OTHER PLANETS* (Parlophone Records 2002).

grace: “propriety, seemliness, comeliness.”<sup>6</sup> For example, “performed the necessary task without fanfare and with a quiet grace.”<sup>7</sup> Even better the notion of a disposition to kindness and compassion, as in: “the victor’s grace in treating the vanquished.”<sup>8</sup>

Christian theologian Frederick Buechner said,

The grace of God means something like: Here is your life. You might never have been, but you *are* because the party wouldn’t have been complete without you. Here is the world. Beautiful and terrible things will happen. Don’t be afraid. I am with you. Nothing can ever separate us. It’s for you I created the universe. I love you.

There’s only one catch. Like any other gift, the gift of grace can be yours only if you’ll reach out and take it.

Maybe being able to reach out and take it is a gift too.<sup>9</sup>

Bill Stuntz, in his blogging and in his unassuming and brutally honest confrontation with what life handed him, gave us a glimpse of grace, arising somewhere between blessing and tragedy.

Mindful of and humbled by luck and fate, honest about what’s hard and scary,<sup>10</sup> Bill’s gifts as a teacher, mentor, and colleague were rivaled only by his devotion as husband, father, and friend. The Harvard Law School and the community of scholars — as well as the community connected by Bill’s writings — are better, wiser, kinder because of Bill Stuntz. And to Bill, I leave the last word, for he so well described our need for humility and also our need for judgment and work to repair what we find around us: “We understand that the world is not what it should be, and that our own capacities to understand it are severely limited.”<sup>11</sup>

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<sup>6</sup> See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 984 (1986).

<sup>7</sup> *Id.*

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

<sup>9</sup> FREDERICK BUECHNER, WISFUL THINKING: A THEOLOGICAL ABC 34 (1973).

<sup>10</sup> See William Stuntz, *More Cancer, LESS THAN THE LEAST* (Apr. 3, 2008, 1:09 PM), [www.law.upenn.edu/blogs/dskeel/archives/2008/04/more\\_cancerstuntz.html](http://www.law.upenn.edu/blogs/dskeel/archives/2008/04/more_cancerstuntz.html).

<sup>11</sup> Timothy Dalrymple, *You Will Call, I Will Answer: An Interview with William Stuntz*, PATHEOS (Feb. 2, 2010), <http://www.patheos.com/Resources/Additional-Resources/You-Will-Call-I-Will-Answer.html?&showAll=1#>.

*Daniel C. Richman\**

Bill made a lot of errors in his articles. I know that, because he told me so, often in graphic detail, sometimes years after writing them; sometimes days.<sup>1</sup> As anyone familiar with Bill or his work knows, this sort of harsh self-criticism bespeaks not any laxity or insouciance on Bill's part, or even a false modesty, but rather an intense commitment to intellectual rigor, and (even more astounding for a legal academic) actually "getting it right."<sup>2</sup> The charity that pervaded Bill's comments about the efforts of others — a generosity for which I will always be in Bill's debt — was sorely absent when Bill turned to his own work. There was a scary glee in his voice as Bill spoke of what he'd be writing for the celebration of his work that he grudgingly allowed to occur last year. Its title and theme, he announced, would be "Here are some of the things I got wrong." Suffice it to say that those of us at the celebration were utterly unpersuaded by Bill's effort to undermine the significance and resilience of his towering contributions to our field.

One would think that intellectual rigor and personal humility,<sup>3</sup> however useful for deconstructing synthetic edifices, would hamper Bill's pursuit of the most ambitious scholarly agenda imaginable in his chosen field: trying to understand the interaction of criminal procedure rights with police policies, showing the destructive relationship between substantive criminal legislation and ostensible criminal procedure protections, and piecing together the story of how American criminal justice became so punitive. Any effort to tell these sweeping stories would seem to demand a self-confidence and disregard for nuance totally at odds with Bill's personality. At the heart of Bill's contributions, however, lies a creativity that embraces the rejoinders it provokes, and has produced lasting intellectual frameworks that can only be strengthened and refined by the criticism they welcome.

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<sup>1</sup> This must mean that everything wrong in the pieces I've written with him is Bill's fault. See 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); Daniel C. Richman, Kate Stith & William J. Stuntz, *Defining Federal Crimes* (unpublished manuscript) (on file with the Harvard Law School Library) (a draft that keeps changing as the federal courts make up new uncommon law).

<sup>2</sup> "Getting it right," for those unfamiliar with the term, entails a rough correspondence between one's theoretical (and, one hopes, counterintuitive) analytical frameworks and external realities.

<sup>3</sup> See William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1744 (2003) (book review) ("Imagine how differently most law review articles would read if their authors admitted the possibility that they might be mistaken."); cf. Letter from Oliver Cromwell to the General Assembly of the Kirk of Scotland (Aug. 3, 1650), in 2 THE WRITINGS AND SPEECHES OF OLIVER CROMWELL 302, 303 (Wilbur Cortez Abbott ed., 1939) ("I beseech you, in the bowels of Christ, think it possible you may be mistaken.").

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Just as I can only dimly grasp the deep connection between Bill's faith and the stoicism with which he long bore pain and debilitating illness, so am I hard pressed to articulate the connection, if any, between Bill's medical travails and the powerful image of "pathology" that does wonderful normative work in his probing analyses of criminal justice in the United States. I can, however, appreciate the magnificent fact that Bill committed himself to articulating how the health of our criminal justice system can be improved even as he accepted the unlikelihood of improvement in his own.

Bill's diagnosis of this penal pathology is couched in terms of institutional design and power allocation. "The justice system stopped working," his forthcoming book explains (in characteristically forthright language), "when a particular kind of local democracy — the kind in which residents of high-crime neighborhoods shape the law enforcement that operates on their streets — ceased to govern the ways police officers, prosecutors, and trial judges do their jobs."<sup>4</sup> At the heart of the treatment Bill proposed, however, is an extraordinary, indeed inspiring, faith in humanity. Even as he recognized the intolerance, corruption, and stupidity that have played all too large a part in our criminal justice history, he believed in the potential of most Americans, when confronted with their fellows up close, to know and do justice, even when given the discretion to do otherwise. It's not only this faith, however, but a deep engagement with reality that led Bill to forgo the flight from politics that so many others in the field would make. Rather than call for insulated commissions or new judicially protected rights, Bill would have us return to the fray. While "the right kind of constitutional restrictions would make for a better and fairer justice system," he wrote, "the more urgent need is for a better brand of politics: one that takes full account of the different harms crime and punishment do to those who suffer them — and one that gives those sufferers the power to render their neighborhoods more peaceful, and more just."<sup>5</sup> Bill made no claim that doing the right thing is easy. Just necessary. And that's the way he lived his life.

Let me end, as I began, on a note of failure. In his preferences — baseball, cheap beer, and in general what Pam Karlan has properly called Bill's "goyish" tastes — in his perpetual chip on his shoulder about the loss of the Colts to the Jets in 1969, and his refusal to take on the airs of the academic elite, Bill strove his entire adult life to be an ordinary person. In this, he had a marked lack of success. Ever since I met Bill in 1985 — when I drafted dissents for Justice Marshall

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<sup>4</sup> WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN JUSTICE* (forthcoming 2011) (Jan. 2011 manuscript at 269).

<sup>5</sup> *Id.* (Jan. 2011 manuscript at 9–10).

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to the criminal majorities Bill drafted for Justice Powell — Bill was a towering intellectual presence, an academic colleague without peer, and a friend whose dry wit, sense of humor, and scorn at façades and pretense made my life (and I'll bet the lives of so many others) more fun, rewarding, and just plain better.

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*Robert E. Scott\**

My relationship with Bill Stuntz began in 1981 when he was assigned as a first-year student to my course in Contracts. This was a large class — close to 150 students as I recall. And, in a quirk of the random selection mechanism, the class contained a majority of the students who would later comprise the managing board of the *Virginia Law Review*. As a group, they made that class one of the best teaching experiences of my life in Contracts.

To be sure, Bill was an anonymous member of this extraordinary group for a month or two, but after a while, having called on him several times, I knew that this one was a gem: like many others in the class he was smart and very well prepared, but what distinguished Bill was his remarkable skill at making good legal arguments. He had a rare gift — an intuitive ability to distinguish good arguments from silly ones. All this is true, but it is only the preface for the story I am about to tell.

By the second semester, we reached the point where it was time to think about relational contracting in fairly rigorous terms. The material was hard for many students as it involved a good bit of economic analysis, but I had confidence that, with the assistance of Stuntz and his cohort, difficult concepts would be clarified quickly. By now, Bill's hand was often in the air and, almost invariably, he made really smart points — but not always. One day, I was teaching how parties to relational contracts can agree on the optimal quantity of goods to produce and sell. I used a simple graphic of a marginal cost curve sloping upward and a marginal revenue curve intersecting it sloping down.

Then I posed a softball question to the class: Assume the parties consist of a principal as the producer of a good and an agent as the good's distributor, and assume that they know these curves. I then asked, "at what point would they ideally want the agent to stop sell-

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ing?” All will recall from their Introductory Economics course in college that the stopping point is at the point of maximum joint profitability where the curves intersect. I looked out in the class and to my relief spotted Bill with his hand in the air: “Yes, Mr. Stuntz.” “When the lines are the farthest apart,” he said proudly. I was completely nonplused. All I could do (as he would later remind me for years to come) was to say, five times over, NO! NO! NO! NO! NO!

Notwithstanding this one embarrassment, Bill excelled in Contracts, earning the highest grade in the class in both semesters. We kept in contact as he progressed through law school and so I was delighted when my colleagues and I could welcome him back to Virginia as a colleague several years later. I confess that I was disappointed when Bill — against my best advice — chose criminal procedure rather than contracts and commercial law as his scholarly concentration, but after several years we agreed to co-teach a seminar on Plea Bargaining, and out of the seminar came a law review article: *Plea Bargaining as Contract*.<sup>1</sup> In the middle of the editing process for the article, I was named dean of the Law School and Bill with customary grace assumed one hundred percent of the responsibility for preparing the piece and a subsequent reply for publication. When the editors requested citations, I told Bill to deal with it. Only later did I discover that this required endless hours of negotiations with the *Yale Law Journal* over my practice of reusing old footnotes that I had first trotted out in earlier articles.

For the next ten years our relationship took on a somewhat different cast. Bill became a most valued informal advisor and confidant. I used to walk the halls, especially in the late afternoon. Sooner or later, I would end up at Bill’s office. The door was open, his feet were on the desk, surrounded by piles of books, hundreds of empty Coke cans, and other detritus. Not once did he indicate that his time could be better spent on his own projects, and I would usually unburden myself about matters far removed from his own sphere of interests. Often our conversations would turn to baseball. I hope I am not disclosing a closely guarded secret when I reveal to his Cambridge friends that Bill was then a life-long devoted fan of the Baltimore Orioles. As for me, forty years of loyally rooting for the Cleveland Indians had brought nothing but grief. But 1995 was a new dawn for the Indians: they streaked to the top and won the American League Pennant, led by an exciting lineup that included a young slugger named Manny Ramirez. Bill was skeptical of their ultimate success, however, given Ramirez’s unfortunate tendency to sleepwalk through all aspects of the game

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<sup>1</sup> Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

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other than hitting. “Nobody is ever going to win the World Series with that guy in left field,” he prophesied. This was quite false as it turned out to his great delight when his adopted Red Sox won the World Series in 2004 and 2007, led both times by Manny Ramirez.

More often, Bill’s advice and counsel was prescient. Early in my deanship I made a rookie mistake. In the 1940s the local bar association had donated a wall plaque to the Law School and it had hung ever since in the central hallway of the School. The plaque was a quote from Samuel Johnson entitled “A prayer before the study of the law.” A Jewish student had objected to the plaque and its explicitly Christian message and, after consulting with my constitutional lawyers on the faculty (and armed with a vision of Thomas Jefferson’s legacy as the author of the Virginia Declaration on Religious Freedom), I had the plaque taken down in obedience to the First Amendment. All hell broke loose. The evangelical Christian community at the Law School was outraged, the issue was taken to the Rutherford Institute (and to Rush Limbaugh), and soon we were being sued for violating the students’ exercise of religious expression in a public forum. University trustees and important donors weighed in against this arrogant exercise of political correctness. The university administration was content for me to hang there, in the words of John Ehrlichman, twisting slowly in the wind. So, I turned to Bill. And with the help of a mutual friend, Richard Dean, they were able to reach out to the students and persuade them that Scott might be stupid but he had a good heart. We finally reached a compromise: to place the plaque in the display case of the rare book room, where it remains to this day. Bill’s role in this episode was typical of his character: quiet and modest, and behind the scenes he persuaded the students to drop the litigation and I survived.

My memories inevitably race forward to the summer of 1999 and Bill’s decision whether to leave Virginia for Harvard. I am embarrassed to say that I pulled every trick fair and foul to try to get him to stay. When he told me he was leaving I was, quite frankly, devastated. From then on our time together was more limited and much of the time we communicated by phone or in the long and incredibly helpful memos Bill would faithfully write as I continued to send him drafts of my articles for comment. The comments are so evocative of Bill, that I must share a few of the opening lines.

From February 1, 2002: “Bob: I’ve now read the default rules paper. I doubt I have any useful comments. I have only two points, both probably wrong.” This statement was followed by two pages of insightful comments.

From January 31, 2003: “Bob: I’m sorry for taking so long to get back to you. Following are some brief comments on *A Theory of Self-Enforcing Agreements*. Actually, as you’ll see, I only have one com-

ment and it's not much of one." This "single" comment extended for three single-spaced pages and made its way practically verbatim into the final version of the article.<sup>2</sup>

Finally, June 2003: "Bob, I liked the *Contract Theory* paper a lot, but I have little to say: you guys are four steps ahead of me." This was followed by two more pages of the best critique I received on that paper, concluding with the following: "What about contracting for procedure rather than substance. It seems to me your argument logically implies that the parties ought to be able to alter the evidence rules that would govern in a court proceeding or alter the burden of persuasion and the like." That single comment was the foundation for a paper on *Anticipating Litigation in Contract Design* that George Triantis and I published two years later.<sup>3</sup> So, Bill might not have known anything about contract theory but he sure made important contributions to the field.

But, as the years went by, most of all I looked forward to the telephone calls. They always came with the familiar greeting that all of Bill's friends recognized as his peculiar form of self-deprecation: "Bob? This is Bill . . . . I hope I'm not bothering you . . . ." My answer was always the same. "No Bill, not at all . . . but how about those Yankees!" Invariably, I was repaid by a joyful guffaw followed by what I had been hoping for all along — a hoot of derision. And then we were on to baseball one more time . . . .

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*David Skeel\**

The first rumor we students heard when Bill Stuntz returned to the University of Virginia to teach after his Supreme Court clerkship was that he hadn't gotten into Virginia the first time he applied. He'd been turned down, the story went, spent a year working as a clerk at a local hotel called the Boar's Head Inn, got in on his second try, then went on to graduate first in his class. It was fitting that even the ru-

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<sup>2</sup> For an illustration of "pure" Stuntz, see Robert E. Scott, *A Theory of Self-Enforcing Agreements*, 103 COLUM. L. REV. 1641, 1674-75 (2003).

<sup>3</sup> Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006).

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mor Bill spawned was encouraging to the rest of us (we too might start humbly yet achieve great success).<sup>1</sup>

I sometimes wonder if that year as a hotel clerk was one of the secret ingredients of Bill's humility. At a presentation by a scholar in family law or bankruptcy, Bill would preface his question by saying that he didn't know anything about the subject and seem to mean it. After giving an hour of his time to work through an idea or a paper or a problem that someone was struggling with, *he* would apologize to *them* for "taking up so much of [their] afternoon." This might be easy for someone who really doesn't know a great deal or really is presuming on the student's or friend's or colleague's time. It was almost unfathomable in a scholar who transformed an important area of legal scholarship — criminal law and criminal procedure — and pioneered another — contemporary Christianity and law.

One of Bill's colleagues once told me that Bill was the "dumbest smart person she'd ever met." This wasn't intended as an insult (though I suspect she may also have had Bill's penchant for putting ketchup on steaks or his susceptibility to practical jokes in mind). What she meant was that Bill's intuitions — the ideas he thought were self-evident — were often anything but self-evident to everyone else. In one of his most famous articles, Bill showed that the new constitutional protections the Supreme Court had put in place for criminal defendants (such as the *Miranda* rule and an expanded exclusionary rule) may actually have had a perverse effect on criminal justice.<sup>2</sup> In another article, Bill identified and solved a paradox with the criminalization of gambling and the social battles over abortion and gay rights: the odd tendency of these laws to undermine the very norms they are designed to promote.<sup>3</sup>

Bill's commentary in popular magazines was as stunningly counterintuitive as his legal scholarship, and I believe his meditations on his cancer will have as powerful an impact in their way as his seminal criminal procedure articles.<sup>4</sup> Indeed, they already have. Each time Bill emailed me a post for the blog we co-authored (always telling me not to use it unless I thought it was "okay"), I would brace for the emails I would receive as soon as it went up. Many confided, to paraphrase only slightly, that my "posts weren't so bad, but Bill's —

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<sup>1</sup> Much later I learned, much to my surprise, that even the first part of the rumor was true. I suspect that UVA's admissions standards, or perhaps the admissions officer, were soon changed.

<sup>2</sup> William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (arguing that, because their fees are capped, defense attorneys may focus on the new procedural objections and forgo the careful investigation that would be necessary to determine whether the defendant may be innocent).

<sup>3</sup> William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871 (2000).

<sup>4</sup> For Bill's meditations on cancer, see LESS THAN THE LEAST, [http://www.law.upenn.edu/blogs/dskeel/archives/health\\_and\\_daily\\_life/](http://www.law.upenn.edu/blogs/dskeel/archives/health_and_daily_life/) (last visited May 5, 2011).

well, they were simply unforgettable.” As my wife once put it: “Everything Bill writes is interesting.”

The irony of having such an original mind is that one’s insights may become the conventional wisdom. Novel at the beginning, obvious when everyone else catches up.

Bill would never have begrudged this. This wasn’t because he lacked ambition or didn’t value it,<sup>5</sup> but because he believed that our enterprise as legal scholars of trying to better understand and perhaps improve the world is a collective one. This commitment to our common mission was perhaps most evident in something Bill, unlike most scholars of his stature, didn’t have: disciples. The work of some scholars — such as Daniel Richman of Columbia, my colleague Stephanos Bibas, or Barbara Armacost of the University of Virginia — would be hard to imagine without Bill’s inspiration. And countless scholars have borrowed from Stuntz — “stealing” his insights, as David Sklansky has written.<sup>6</sup> But Bill encouraged new thinking, not devotion to his own ideas.

Two attributes of Bill’s insights will nevertheless keep them from dissolving into the conventional wisdom. The first is simply that his best known ideas were so radically new when he developed them. No one can talk about the unintended consequences of the Supreme Court’s constitutional criminal procedure cases or the political pressures to steadily expand federal criminal law without a nod to Bill’s work.

The other is more aesthetic: the arresting images that capture the ideas. Bill famously described the constant pressure to criminalize publicly salient misbehavior as a “one-way ratchet.”<sup>7</sup> And he spoke of law’s “double game” — the need to police sinfulness without giving lawmakers so much discretion that they will enforce a law in discriminatory fashion, an objective he later called the “modest rule of law.”<sup>8</sup>

During my final year of law school — and Bill’s first of teaching — I did a small amount of research for him. Bill didn’t just give me a research assignment; he asked me to critique his draft, and treated my ill-informed comments as if they might teach him something. I wasn’t

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<sup>5</sup> A small example: several months before a major conference at Harvard Law School honoring Bill’s work last spring, I told him I was struggling to suppress my impulse to treat the conference as an opportunity to enhance my own professional status. Bill surprised me by saying: “I think you’re wrestling too much. There isn’t anything wrong with seeking some professional gain for yourself in this or any conference — that’s the chief reason to have conferences.”

<sup>6</sup> David Sklansky, *Stealing Bill Stuntz*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM STUNTZ* (forthcoming 2012).

<sup>7</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001).

<sup>8</sup> David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PA. J. CONST. L. 809 (2006).

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used to having professors who didn't assume they already knew most of what there was to know. Many years later, an evening janitor got the same treatment when Bill and I encountered him as we walked through the tunnels of Harvard Law School on our way to a meeting with the law school's Christian Legal Society students: Bill greeted the janitor by name, asked about his family, and stopped to talk.

Even in his final weeks, Bill loved to laugh. The last time I saw him, he joked, almost as soon as I'd walked in the door, that he had "already lived past [his] expiration date."

In an essay about heaven, C.S. Lewis wrote:

It may be possible for each to think too much of his own potential glory hereafter; it is hardly possible for him to think too often or too deeply about that of his neighbour. The load, or weight, or burden of my neighbour's glory should be laid on my back, a load so heavy that only humility can carry it . . . .<sup>9</sup>

The essay, which Bill once called his favorite Lewis writing, extols those who recognize both that "[t]here are no *ordinary* people,"<sup>10</sup> and that even "the dullest and most uninteresting person you can talk to may one day be a creature which, if you saw it now, you would be strongly tempted to worship."<sup>11</sup>

Anyone who knew Bill can guess, although Bill probably could not, why he was so strongly drawn to this essay: it's about him.

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*Carol Steiker\**

"*Niiice*," he would say. "*Nice*." He'd be nodding, eyes lit up, and speaking with the kind of appreciative tone someone else might use to describe a sports car or a vintage wine. This was Bill's reaction to an interesting point made by a colleague or a student, in conversation or in class. Never much into sports cars or wine himself, Bill really enjoyed and appreciated discussions about ideas — his, yours, it didn't really matter. He was as likely to give you a "*nice*" for a point disagreeing with something he'd just said or written as for agreeing with or flattering him. "That's very sweet of you," he'd say, dubiously, if

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<sup>9</sup> C.S. LEWIS, *The Weight of Glory*, in *THE WEIGHT OF GLORY AND OTHER ADDRESSES* 3, 18 (Walter Hooper ed., 1980).

<sup>10</sup> *Id.* at 19.

<sup>11</sup> *Id.* at 18.

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someone complimented his own work. “But I’m not sure I’ve got it right.” I loved eliciting a “*nice*” from Bill, but it was absolutely magic when he shined the beam of his appreciation on a student in the classroom. Bill and I taught together on more than one occasion, and I saw how his confidence and delight in the capacity of students to engage with him on his level energized and excited a class.

Bill’s faith in the capacities of others was part of his larger kindness and decency. Bill was, in fact, one of the kindest and most decent people I have ever met, while also being extraordinarily talented and ambitious. It’s clear, however, that he put kindness and decency first, way ahead of the nurturance of his own talents and ambitions. He was never too busy to talk to a colleague or student, and that openness led to heavy demands on his time. The number of students and junior colleagues who have relied on his interest and support over the years is too large to calculate. I count myself as one of Bill’s mentees, as he offered advice and intellectual engagement over the course of my own career — from the publication of my first article, which he commented on substantively the very first time I met him, to career advice he offered as recently as two weeks before his death.

Bill took his obligations to institutions as seriously as he took his obligations to individuals. He believed deeply in serving the law school and rarely if ever said no when asked to take on responsibilities, even time-consuming and contentious ones. In the last months of his illness, he often asked if I thought it would be OK for him to miss a particular faculty workshop or meeting. The first few times, I just said, “Of course, Bill.” But when he persisted, I started rolling my eyes and saying, “You’ve got to be kidding!” But he wasn’t kidding. “Doing the right thing” and “being a good person” — these weren’t platitudes to Bill; they lay at the very heart of who he was. If Bill were a building, these commitments would be the cornerstones, and all of his many talents and achievements only the ornamental trim.

Being kind and decent, however, didn’t make Bill a pushover. He was extraordinarily demanding of himself and others intellectually. During the last year of his life, Bill pushed himself through growing fatigue and pain to finish his book on *The Collapse of American Criminal Justice* — a sprawling opus that represents the culmination and synthesis of much of his recent work and thought. The steely determination that drove Bill to finish his book also drove his commitment to “get it right.” When he sent me the manuscript, it was clear that he wanted to know what needed to be added, expanded, changed, or tweaked. Even as he edited, Bill was never satisfied, always sure that “getting it right” would demand more thought, more time, more wrestling. Although Bill was kinder to the work of others than to his own, it wasn’t because he didn’t see the flaws; rather, he simply expressed himself differently in outward-directed critique. Those who knew Bill

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well knew to start taking notes when he'd begin, "I could be wrong about this, but . . ." Unfortunately, he wasn't often wrong.

Bill's own work, flawed though he was convinced it was, has excited and transformed the legal academy in our shared field of criminal justice. Bill sought to break down the artificial divide that had long separated the study of substantive criminal law and criminal procedure, and he tried to understand and map out the subtle interactions among the different components of the criminal justice system. Tenaciously productive, even in pain and illness, Bill produced work that often defied easy categorization. Not only did it evade the substance/procedure divide, it also eluded the right/left political divide that is so apparent in most work on criminal justice. On the one hand, Bill was cheered by the traditional "right" for his critique of the Warren Court's criminal procedure revolution and its (in)famous embrace of the Fourth Amendment's exclusionary rule and the Fifth Amendment's *Miranda* warnings. On the other hand, Bill's critique of the Warren Court was based not on concern about insufficient "law and order," but rather on traditionally "left-wing" concerns about the distributive effects of the criminal procedure revolution. The enormous increase in the American incarceration rate since the 1970s and its marked racially disparate impact lay at the heart of what Bill believed was wrong with the American criminal justice system.

One of the more recent conversations I had with Bill was about a play I'd seen and liked, called *Take Me Out*, a Tony-award winning play about the public coming out of a gay Major League baseball player.<sup>1</sup> I thought Bill, an avid baseball fan, would be amused by the soliloquy at the end of Act One, comparing baseball to democracy: "[B]aseball is a perfect metaphor for hope in a democratic society. . . . Everyone is given exactly the same chance. And the opportunity to exercise that chance at his own pace. . . . What I mean is, in baseball there's no clock. What could be more generous than to give everyone all these opportunities and the time to seize them in as well? . . . And baseball is better than democracy . . . because, unlike democracy, baseball acknowledges loss. While conservatives tell you, 'Leave things alone and no one will lose,' and liberals tell you, 'Interfere a lot and no one will lose,' baseball says, 'Someone will lose.' Not only *says* it — insists upon it! So that baseball achieves the tragic vision democracy evades. Evades *and* embodies."<sup>2</sup> Bill smiled in recognition when I quoted this soliloquy, because he had turned his own work toward that "tragic vision," focusing his attention on the losers in our democracy. He called the politics of American criminal justice "pathological"

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<sup>1</sup> RICHARD GREENBERG, *TAKE ME OUT* (2003).

<sup>2</sup> *Id.* at 35–37.

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in their relentless turn toward harshness, especially for poor and minority defendants.<sup>3</sup>

In many ways, Bill was a bundle of contradictions. He was both more conservative politically than most law professors and at the same time more radical. He was extraordinarily successful and intellectually ambitious, but at the same time deeply humble. He was a devout and committed Christian, yet very much a questioner of everything, including issues of religious doctrine and faith. He lived a fairly conventional life, yet he enjoyed and admired people who broke conventions and took chances. These contradictions didn't cancel each other out; rather, they somehow added up to something bigger — the very definition of what people mean when they call someone a “true original.”

Cancer is a cruel disease in its usually long, painful, and debilitating denouement. But it also gives the gift of time — time for families and friends to say and do all the things that need saying and doing at the end of a life. In his last weeks, I was able to sit with Bill and to find the words to tell him what he meant to me as a colleague and friend. I told him no more than the truth — that his distinctive voice will always be in my head, gently critiquing me (“I could be wrong about this, but . . .”) and offering me, I hope and energetically aspire to, the occasional “*Niice.*”

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<sup>3</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).