THE POLITICAL HEART OF CRIMINAL

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

The leading scholars of the mid 1980s had witnessed the Warren Court revolution first hand and, in some cases, had in at least small ways, helped to shape it. Yale Kamisar, the famous University of Michigan law professor, had written an influential article shortly before *Miranda* that may have influenced the Court's thinking.[4]

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

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Stuntz's earliest articles already reflect many of the tendencies that would characterize his vision of criminal law and criminal justice. The first, a 1988 article entitled "Self-Incrimination and Excuse," noted that the Fifth Amendment privilege against self incrimination is invariably conceptualized in terms of privacy or autonomy values.[5] The actual caselaw was a very poor fit for either value, however. The Supreme Court had held that defendants can be ordered to give a blood sample, for instance, or to identify themselves at the scene of an accident. These and other anomalies suggested either that the doctrine had leapt the rails, or that something else was going on.[6] Stuntz argued for the latter. He began by homing in on a tension that lies at the heart of the Fifth Amendment: we expect defendants to be honest, but also worry that compelling honesty in this context would sorely temp

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

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

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

[8] *Id.* at 591.
[9] William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991).

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

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

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

[11] *Id r3*

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

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

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

[14] Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

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

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

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

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

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

[16] [CITE to Amar's 1997 book]

[17] William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

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

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

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

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

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

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

In "The Uneasy Relationship," Stuntz's treatment of Fourth and Fifth Amendment doctrine is, by his standards at least, stylized. The doctrine, and the role of appellate courts, is a single component of the larger framework of moving parts. But Stuntz also continued to wrestle with the intricacies of the Fourth and Fifth Amendments. In a pair of companion articles, both published in 1995, Stuntz put the contemporary doctrine in historical perspective.[20] In both articles, Stuntz explained the preoccupation with privacy in the Fourth and Fifth Amendment cases as a historical accident, and argued that its effects have been perverse. The original cases were actually designed to curb the government's ability to prosecute critics and suspected heretics. Their origin was thus substantive—they were a check in the breadth of criminal laws—not procedural. Although the 1886 case of

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

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

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

This work came in the midst of major cha

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

A major theme of the first of the two major strands of Stuntz's work—its concern for the criminal justice system as a whole—is a perverse dynamic of the legislative process. Faced with a decision whether to vote for a proposed new federal crime, lawmakers are far more likely to vote than against. Stuntz identified this tendency in "The Uneasy Relationship," focusing primarily on the possibility that legislators might consciously expand the criminal code to weaken the constraints on police and prosecutors of the Supreme Court's criminal procedure restrictions. In another classic article, "The Pathological Politics of Criminal Law," Stuntz analyzed the dynamic in much detail. "How," he asked, did criminal law come to be a one way-ratchet that makes an ever larger slice of the population felons …?"[23] Stuntz linked the one-way ratchet to prosecutorial discretion. Because prosecutors decide whom to pursue, they rather legislators will be held responsible if the statute is overbroad and prosecutors use it to convict a

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

Stuntz's preferred solutions to these problems often involved judicial intervention. Courts should aggressively police the requirement than suspects be given adequate assistance of counsel, and they should refuse to allow conviction under laws that are not systematically enforced. As discussed below, he also incr

The other major theme in Stuntz's later Fourth and Fifth Amendment articles was the need for a more flexible Fourth Amendment. The O.J. Simpson trial and Kenneth Starr investigation of Bill Clinton showed the folly of a single, "transsubstantive" standard.

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

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

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[31] William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871 (2000).

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

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

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

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

[34] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (HARVARD UNIVERSITY PRESS, forthcoming 2011).

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

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

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

Police Investigation

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

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

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

define probable cause, Kerr argues th

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

Emotion, Discretion and the Judicial Role

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

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

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

In Chapter 12, “Justice and Mercy, or How I Learned to Love Discretion,” Carol Steiker notes that the dramatic change in American criminal justice have invariably assumed that “discretion is essentially problematic.” One of Bill’s Stuntz’s signal contributions was, “like the