

BOISI CENTER

INTERVIEWS



NO. 59: SEPTEMBER 22, 2011



DAVID SKEEL is the S. Samuel Arsht Professor of Corporate Law at the University of Pennsylvania Law School, and a frequent writer on bankruptcy, corporate law, sovereign debt, and Christianity and law. He spoke with Boisi Center graduate research assistant **Brenna McMahon** before his presentation on Christian legal theorist William Stuntz at the Boisi Center.

MCMAHON: You are a long time collaborator and friend of William Stuntz. Can you talk about how you met and how your friendship grew?

SKEEL: We met at the University of Virginia's Law School. I was a third year law student, and he was a very, very young law professor in his first year at teaching. He had just come from a clerkship on the Supreme Court with Justice Powell and was just two years out of law school. So I had the very good fortune of being in one of his first classes, which, not surprisingly, given Bill, was brilliant. I also did a little bit of research for him as a research assistant in my final semester. We really became friends when I started teaching myself three years later. We kept in touch and we shared a lot of interests, and that ultimately led to writing together.

MCMAHON: Stuntz had a large and important influence on criminal justice and criminal procedure. What was the field of criminal justice like before and after his scholarship? How did the Warren Court revolution fit into this?

SKEEL: The Warren Court is named after Earl Warren, who was the Chief Justice for many years. He is most famous nationally for having shepherded *Brown vs. Board of Education* through the Court as a unanimous decision early in his tenure on the Supreme Court.

In the 1960s, the Supreme Court, under his leadership, issued a number of opinions that expanded protections for criminal defendants. The one that is best known is the *Miranda* decision—which everybody remembers from the TV cop and robber shows—which required that



the police read you your rights and say you have the right to remain silent before they start talking to you. The Warren Court also expanded the exclusionary rule.

That is the rule that prohibits improperly gathered evidence from being used against you at trial. And the Court held that every criminal defendant has a right

to have an attorney in a case called *Gideon vs. Wainwright*.

These cases pretty radically expanded criminal procedure doctrine in ways that were designed to help criminal defendants. When Bill Stuntz first started writing, criminal procedure scholarship was all about the Warren Court “revolution.” Most of the prominent scholars then were cheerleaders for the Warren Court. One of the best known scholars—and still very famous today—was a law professor named Yale Kamisar at the University of Michigan. He wrote several articles that are thought to have encouraged the Warren Court and contributed to its thinking in cases like *Miranda*. Other law professors were similarly enthusiastic about what the Supreme Court was doing.

So criminal procedure scholarship was really about cheerleading the Warren Court, and then when the Court turned more conservative, it was about criticizing the shift.

MCMAHON: In your introduction to the book you co-edited honoring Professor Stuntz, you wrote that he tried to bridge the divide between criminal procedure and general criminal law. Could you talk about what that divide is and what's at stake in unifying it?

SKEEL: We've just been talking about what criminal procedure scholarship looked like in the '70s and '80s. While you might think that criminal law and criminal procedure scholarship are closely connected, there was little overlap during this period. While criminal procedure scholars were talking about the Warren Court, criminal law scholars were talking about the philosophy of punishment. And they acted as if the two fields were unrelated, as if criminal law and criminal procedure didn't have anything to do with one another.

One of the first and most important things Bill did in his scholarly career was to show that they're really all part of one criminal justice system. A lot of his writing is about the various moving parts in that system and how they work together. So criminal procedure scholarship before Bill Stuntz was really about the Warren Court. After Bill Stuntz and during Bill Stuntz, it started to look radically different and to focus much more on the criminal justice system as a whole and how it works and how it doesn't work.

MCMAHON: You've also written that Professor Stuntz tried to integrate an understanding of the many actors in the criminal justice system into criminal law. Can you explain why this insight was so important?

SKEEL: As I noted a moment ago, one of the innovations that he brought was a focus on the behavior of the different actors in the system. Rather than just talking about what the Supreme Court was doing, he talked about what do prosecutors do, what do police officers do, what do legislatures do, and how each of them responds to the others.

Several of his most famous observations highlighted the real perversity of these interactions. As the Warren Court restricted what police and prosecutors could do, legislators simply expanded the criminal law, which made it easier to convict despite the Warren Court protections. To make matters worse, the

Warren Court rulings had the unintended consequence of encouraging the lawyers for criminal defendants to focus on procedural objections, where are cheap to litigate, even when the defendant may have strong substantive arguments against conviction.

Bill also argued that the defining of criminal law is like a one-way ratchet: it only goes in one direction. What he meant is that, if you're a politician considering a crime bill that's designed to turn

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whatever the latest misbehavior is into a crime, you have an enormously strong incentive to vote in favor of that crime bill because you won't be punished if the law is a bad idea but it gets enacted. But you will be punished if the new criminal law doesn't get enacted—you'll be attacked as soft on crime. So the way the political process works in this country—at least in the current generation—is such that the criminal law gets ever broader because of this one-way ratchet effect.

These are the kinds of things he focused on: how the players in one part of the system responded to what's going on in another part of the system, and what is the ultimate effect of that.

MCMAHON: Was integrating behavior into legal analysis something new?

SKEEL: It absolutely was, though of course it was not created out of thin air. Bill was drawing on ways of thinking about the law that were becoming important in other areas of the law. The particular methodology that Bill was drawing on here is known as public choice. Public choice is aimed at understanding the incentives in different parts of the legal system and the political system, based on the assumption that each of the players will tend to pursue his or her own interests. It's a branch of economics that Bill imported into criminal justice, where it had not been used previously.

MCMAHON: Just to step back for a minute, you present him as working with a real energy and enthusiasm: what motivated him?

SKEEL: What I think motivated everything about him ultimately was his faith and his understanding of the Christian story and what that means for the way we live our lives. That was coupled for him with several other qualities, which I think were very much related to his faith and how he understood Christianity. One was the importance of humility; he never assumed he had the right answer and was modest about how much we can know.

Another, which might seem to be at odds with that but that I think really fits very nicely, was a love of argument and a love of ideas. He really felt like those two things went together: that you should be humble about the position you're taking today because you might learn something tomorrow that will alter that position; and that you shouldn't shy away from arguing, from debating issues. He just had a love of ideas, a love of discus-

sion, a love of paradox and of the surprise of unlikely connections.

I think all of that flowed ultimately out of his faith. He felt like that's what Christianity is all about. It's about how Jesus turned the normal relations of the world on their head: the last shall be first and the first shall be last. So together, it produced really a truly remarkable set of qualities. I think many of us would aspire to those qualities and would seek to be humble, would seek to love ideas and to revel in the play of ideas, but Bill actually put all of these qualities together.

MCMAHON: Do you think that his evident concern for justice also comes from his faith?

SKEEL: I absolutely do. The concern for justice was present throughout his scholarly career, but it became more and more important and more and more central in both optimistic and pessimistic ways. Bill became very worried about the criminal justice system and the institutional racism he saw in way that poor defendants are treated differently than the wealthier defendants.

These kinds of concerns became increasingly central to his writing, but they were driving him from the beginning. He was trying to figure out what justice means, what it should look like, and how we can work within the system we have to move closer to justice. He wasn't naïve about the difficulties of achieving anything

that looks like justice, but he did feel like justice was our responsibility to pursue.

One of the things he felt very, very strongly about in the intellectual sphere with respect to our task as scholars was that we should be seeking truth and we should be seeking justice. Those qualities seem obvious when you say them, but they're not pervasive in academia. Academia in the scholarly world is not always about seeking truth and trying to make the world more just. Bill felt very, very deeply that that needs to be our mission and that's that what we need to be about.

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The Boisi Center for Religion and American Public Life
Boston College
24 Quincy Road
Chestnut Hill, MA 02467

tel 617-552-1860
fax 617-552-1863
publife@bc.edu

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