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Criminal Procedure, Justice, Ethics, and Zeal

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CRIMINAL PROCEDURE, JUSTICE, ETHICS, AND ZEAL

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William Stuntz's recent article, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice,*[1] offers a series of thoughtful observations on the reasons that criminal procedure doctrines designed to protect defendants have done so little to improve the criminal justice system. Stuntz's article describes the unintended effects of attempts by the United States Supreme Court to improve criminal justice by closely regulating criminal procedure. That procedural focus has had perverse effects because, in a dynamic criminal justice system, other institutional players have responded to procedural rules in ways that undermine appellate courts' goals. Specifically, legislatures have reacted by expanding substantive criminal law — which the Court chose not to regulate under the Due Process Clause — and by underfunding criminal defense (as well as prosecution offices). That reaction was especially strong because increased procedural regulation coincided with a dramatic increase in crime beginning in the 1960s, which further encouraged legislative reaction to antimajoritarian court decisions that favored defendants.

Prosecutors, for their part, may react to procedural rules that increase prosecution costs by shifting efforts away from prosecuting wealthier defendants — who can afford to invoke the procedural rights as defense mechanisms — and toward poorer ones, or by forgoing prosecutions of clearly guilty suspects with strong procedural arguments for those with weaker procedural claims. Neither basis relates to the defendant's factual guilt, so less guilty suspects may receive more attention than more guilty ones.[2] Comparably,

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

2. Dan Richman recently made a related argument about the effect on prosecutorial accountability of a decision regulating criminal evidence. *See* Daniel C. Richman, Old Chief v. United States: *Stipulating Away Prosecutorial Accountability?,* 83 VA. L. REV. 939 (1997). He argues that the Supreme Court's decision in *Old Chief v. United States,* 519 U.S. 172 (1997), which grants defendants the right to stipulate to a prior conviction when charged with possession of a gun by a felon, has subtle but important effects on prosecutorial discretion about charging decisions (and also on jury decisions). In particular, if prosecutors seek solely

defense attorneys may respond to funding cuts and to new procedural rights by allocating their limited time to procedural claims rather than factual investigation that goes to the substance of a client's defense. Stuntz's central point, as I take it, is to explain how, given a dynamic set of institutions, increased appellate court regulation of procedure has done little to improve criminal justice and thus merits rethinking.[3] Perversely, he notes, the response to procedural regulation poses special risks to poor and innocent defendants.

Stuntz's article illuminates the difficulty appellate courts face in regulating criminal justice through procedural devices because of their inability to anticipate and control reactions by other institutions. That inability stems in large part from the choice not to regulate criminal justice more directly by constraining crime definition, setting minimum funding levels, and enforcing a more rigorous definition of adequate representation. Within this discussion of institutional relationships, however, the article also has a lot to say — more than the article's emphasis may initially reveal — about strategic attorney decisionmaking in a dynamic context of scarce resources. The analysis suggests the need for more attention to a broad array of contextual factors — doctrinal, financial, political, and institutional — that affect lawyers' strategic decisionmaking in ways insufficiently appreciated. I would like to draw out a few of the implications of Stuntz's analysis with regard to the tension between structural conditions of practice, notions of professionalism, and the ways we train lawyers with little attention to the context of practice. For brevity, I will focus on defense attorneys.

Recent discussions on the ethics of criminal defense recognize the scarcity of resources under which both sides work, particularly in state courts. William Simon and David Luban's exchange on this topic is especially notable.[4] Simon argues that defense lawyers

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to maximize conviction rates (a debatable assumption), the *Old Chief* rule may make prosecutors indifferent to the defendant's prior record or future dangerousness and more conscious of racial and class factors that could make conviction more likely. In a more limited way, then, Richman's argument identifies not only the effect of rule changes on strategic lawyering decisions (a well-known effect), but also the way such rule changes can have different effects systemically (over a large class of cases managed by an attorney) than they do in an isolated, individual case, where the *Old Chief* rule may improve fairness by removing the prejudicial effect of proof about a prior felony.

3. *See* Stuntz, *supra* note 1, at 52-74. Part III of the article argues that current judicial-legislative dynamics push courts to create too many procedural rules and legislatures to define crimes too broadly. Part IV discusses an alternative arrangement in which courts might regulate substantive criminal law and the funding of defense counsel more rigorously.

4. *See* William H. Simon, *The Ethics of Criminal Defense,* 91 MICH. L. REV. 1703 (1993) [hereinafter Simon, *The Ethics of Criminal Defense*]; David Luban, *Are Criminal Defenders*

should recognize and accept their ethical discretion to moderate tactics of "aggressive defense" when they know such tactics do not serve substantive justice — that is, when they have more reliable information than the factfinder has that the client is guilty. Luban objects to this use of discretion and urges instead a categorical rule of aggressive defense for virtually all clients.[5] Both acknowledge that prosecutors and defenders work in a world of heavy case loads and limited resources that compel trade-offs between the degrees of zeal an attorney gives different cases. Yet Simon argues that aggressive defense for clients whom the attorney knows to be guilty forces more resources on both sides to that client's case, leaving fewer resources for cases in which the defendant's guilt is in some doubt — precisely the cases that, in order to protect the innocent, need to be litigated more carefully.[6]

What is striking about this debate, in light of Stuntz's account, is the definition of aggressive defense that Simon and Luban share. Neither suggests that an attorney has discretion to forgo either a full litigation of procedural rights or a thorough factual investigation. The debate is restricted largely to whether attorneys should use tactics unconnected to truth determination or rights vindication in order to win. Simon argues only that lawyers should allow substantive justice to inform their discretionary decisions whether to delay litigation in hopes of exhausting state witnesses, present client perjury, impeach state testimony they know to be true, argue factual inferences they know to be false, or use "greymail" tactics of threatening to disclose information unrelated to the merits of the case but injurious or embarrassing to the state or its witnesses.[7] Neither addresses the sort of discretionary decisionmaking that Stuntz's description implies is a significant choice for defense attorneys and that my participatory observation of state court practice confirms. The choices defenders in fact make are often whether to allocate scarce resources to procedural claims or factual investigation, and how much of both to forgo in exchange for a plea bargain.[8]

Different?, 91 MICH. L. REV. 1729 (1993); William H. Simon, *Reply: Further Reflections on Libertarian Criminal Defense*, 91 MICH. L. REV. 1767 (1993) [hereinafter Simon, *Further Reflections*].

5. Prosecutors, of course, already have a well-established duty of such ethical discretion; their mandate is to serve justice rather than seek a maximum conviction in every case.

6. *See* Simon, *The Ethics of Criminal Defense*, *supra* note 4, at 1712-13.

7. *See id.* at 1703-05.

8. *See* JONATHAN D. CASPER, CRIMINAL COURTS: THE DEFENDANT'S PERSPECTIVE 35 tbl.VI-5 (1978) (stating that 59% of public defenders spend less than half an hour with clients); Marty Lieberman, *Investigation of Facts in Preparation for Plea Bargaining*, 1981 ARIZ.

The fact that indigent defense is often inadequate is hardly news. The *reasons* for consistently sub-par lawyering, however, may be misunderstood, at least outside the death penalty context.[9] Some discussions imply the cause is largely that defenders are simply lazy, unmotivated, or lack sufficient skills.[10] When the issue arises of how attorneys allocate scarce resources, ethics discussions — of which Simon and Luban's is among the best — often debate about rationing time and effort only in terms of aggressive defense tactics. Though Simon and Luban recognize the severe resource constraints that practitioners face in state criminal courts, they offer no real advice on mediating choices between basic tasks like thorough investigation and utilization of all procedural claims.[11] Yet, as Stuntz makes clear, resource scarcity is sufficiently great in many settings that attorneys must trade off practices more basic than aggressive techniques — often practices related to important fact investigation. Given the scarcity of their time, attorneys cannot meet their professional obligations solely by rationing aggressive defense tactics or sustaining high levels of zeal. They must also ration fact investigation, and perhaps procedural litigation as well.

Attorneys mediate choices imposed by the material conditions of practice within the current justice system. What we might call the political economy of criminal practice is a key determinant of attorney performance and the quality of client representation. Professionalism literature offers little guidance on the choices attorneys must make within the real-life parameters set by the economy of

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St. L.J. 557, 576 (discussing a study of Phoenix, Arizona attorneys, which found that 47% of surveyed defense attorneys entered plea agreements without interviewing any state witnesses); *see also* Luban, *supra* note 4, at 1735 (discussing these studies); Margaret L. Steiner, *Adequacy of Fact Investigation in Criminal Defense Lawyers' Trial Preparation,* 1981 Ariz. St. L.J. 523, 534, 537 (discussing a similar study in Phoenix, which found that only 55% visited felony crime scenes before trial and only 31% interviewed all state witnesses).

9. Michael Mello's new book, *Dead Wrong,* provides an example of an attorney who came to the conclusion, after years of practice, that high-quality lawyering could not overcome the structure of a criminal justice system in which injustice is endemic. The conclusion is controversial as well as painful, because Mello concedes that skilled and zealous lawyering can make differences in individual cases. But those cases occur in a system that makes unjust outcomes inevitable in innumerable other cases, and the remedy for that problem is structural, not individual. *See* Michael A. Mello, Dead Wrong 200-04 (1997).

10. *See, e.g.,* David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties,* 19 L. & Soc. Inquiry 115 (1994); *see also* Simon, *Further Reflections, supra* note 4, at 1771 (noting "the real problem" is that "most defendants do not get even the attention and effort to which they would be entitled under far more conservative theories of defense," but not specifying whether that is due to resource scarcity, attorney laziness, or both).

11. See, for example, Luban, *supra* note 4, at 1765, where Luban acknowledges a public defender's "caseload and resources [may] make it impossible for . . . her to offer capable defense in every case." His advice is to focus on "clients who are in greater jeopardy and who are less dangerous" and to encourage "aggressive advocacy."

practice. Instead of addressing the strategic and ethical implications of these unavoidable choices, we rely on the dictates of professionalism to urge lawyers to overcome them. By force of will, attorneys must overcome material constraints to meet ethical obligations.

This tension between aspirational goals and the structural setting in which practitioners must fulfill those goals connects with broader observations — touched on recently by Mark Tushnet in a review essay[12] — about changes in the political economy of the "professional-managerial class" since roughly the 1970s, when the post-World War II economic boom began to wane. With reference to the legal community, Tushnet observes that laments about the practice of law evolving from a profession to a mere business correlate with the relative contraction and increased competitiveness of the economy. That correlation suggests that the ethics of professionalism are contingent upon an economy that allows practitioners to forgo some basic cost and profit concerns in the name of professional standards. When material conditions no longer support such behavior without cost, exhortations to high ethical standards and zealous, client-centered counseling are insufficient to maintain those practices.[13]

The institutional settings in which attorneys practice likely have all sorts of implications for the professional habits they develop and strategic choices they make, many of which may go unexamined.[14]

12. *See* Mark Tushnet, *A Public Philosophy for the Professional-Managerial Class*, 106 YALE L.J. 1571 (1997) (book review); *see also* John S. Elson, *Why and How the Practicing Bar Must Rescue American Legal Education from the Misguided Priorities of American Legal Academia*, 64 TENN. L. REV. 1135, 1138 (1997) (noting that "trends toward a far more competitive legal services market" contribute to a practice context that inadequately trains new lawyers and sends them "mixed messages . . . as to their duties of competent practice, client loyalty, community service, and basic honesty").

13. This description fits within a larger portrait of the profit squeeze faced by the corporate sector since the early 1970s, when corporations began to look for ways to fight declining profits. In addition to opposing unions, taxation, and regulation more vigorously, firms sought increasingly to squeeze more work from fewer workers by extending work hours, and to cut the cost of workers by hiring more part-time workers for lower wages and no benefits. We might view this response as an analogy to the legal profession's much-lamented transition from a profession to a business. Just as corporations considered themselves no longer able to afford the impositions of the welfare and regulatory state, law firms began to experience competitive pressures and a profit squeeze that prompted responses such as longer attorney work hours and other cost-cutting tactics. *See* Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Elson, *supra* note 12, at 1138.

14. That problem raises an ethical issue that often varies in practice from how it is formally taught in law school. The rule that students learn is that one may not trade off the interests of one client or case for another; each deserves the attorney's full, uncompromised commitment. The reality is that attorneys frequently must choose the cases in which they will invest resources.

That description suggests an additional emphasis for the study and teaching of professionalism and lawyer decisionmaking. Particularly in practice settings characterized by severe resource scarcity, new attorneys should be made acutely aware of the context of their strategic decisionmaking, recognize that they are rationing very limited resources, and consider the feasibility of giving priority to fact investigation and other merits-based lawyering tasks.[15]

We can draw insights from the behavioral science of choice theory to understand lawyer decisionmaking in a criminal justice system that offers procedural claims, demands for informal factual investigation, a ubiquitous custom of plea bargaining, and constrained resources. Behavioral scientists find that decisions in a wide range of settings are often "context-dependent" in ways that one would not predict from the merits of the options with which one is presented.[16] Much of this research began with the study of consumer behavior. For example, a $100 camera usually appears more appealing to buyers when contrasted with both a $200 camera and a $50 camera than it does when it is set solely against the $200 option. This "compromise effect" describes the common preference for a choice presented as an intermediate alternative over the same option when it is presented as an extreme. Relatedly, a "contrast effect" occurs when the same option seems more appealing if presented with options clearly inferior to it than when it is presented without those alternatives. So, for example, people tend to choose a Cross pen less often when they are offered a choice solely between it and $6 cash than when offered the Cross pen, $6, or an inferior pen. The contrast with the lesser product somehow makes the Cross pen more appealing, though the pen itself — and the consumer's information about it — remains unchanged.

Choice theory has been applied relatively little in legal contexts; when it is explored, the focus is largely on potential judge or jury decisionmaking.[17] But choice theory suggests explanations for

15. We might infer from the existing focus of legal education that lawyers practice in a fairly prosperous private firm or a well-funded government office such as the U.S. Justice Department. Limited resources affect practice decisions in those settings — that is where current laments about the shift of law from a profession to a mere business arise — but not on a scope remotely related to the effect in critically underfunded state defender and prosecutor offices. At some point, the difference in degree becomes a difference in kind that requires specific attention to how lawyering must accommodate a context that virtually prohibits high-quality practice.

16. *See* Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287 (1996); Amos Tversky & Itamar Simonson, *Context-Dependent Preferences*, 39 MGMT. SCI. 1179 (1993).

17. For an excellent recent article representing one of the first efforts to apply this research to legal decisionmaking, see Kelman et al., *supra* note 16 (citing the examples of the

strategic attorney decisionmaking within the context of the existing criminal justice practice, which may partially follow similar patterns despite the dictates of professionalism. Consider, for example, our hypothetical, overworked public defender facing the choices Stuntz describes. She has a plausible suppression motion, a need for considerable investigation (witness interviews, scientific tests) that can be done with varying degrees of thoroughness, and a standard plea bargain offer from the prosecutor that is a substantial discount from the likely sentence based on a full conviction at trial. We can view the attorney's options as: (1) urging a plea after minimal investigation (interviewing the client, reviewing the prosecutor's file); (2) undertaking a minimal investigation plus raising a procedural claim evident from that investigation; or (3) pursuing the procedural claim plus a time-consuming, full investigation. Without resource constraints, we assume professionalism would overcome the compromise effect that makes option two a plausible choice; a diligent attorney would choose option three. But resources are limited. This case is one of many requiring fairly quick attention, several of which pose the same choices. In this context, the compromise effect is more likely; the procedural claim and minimal investigation may seem the most appealing way to distribute the scarce resource of attorney effort. Pressures of context overcome the dictates of professionalism; the political economy of practice shifts the range of acceptable behavior.

Alternatively, we might suspect this situation could prompt a contrast effect. Pursuing only a procedural claim and minimal investigation should seem an unappealing option. It conflicts too sharply with background notions of professionalism. But contrasted against a case with *no* procedural claim for which one does only minimal investigation — a practice choice the attorney has likely observed in this setting — pursuing only a procedural claim and minimal investigation starts to look more defensible. Minimal investigation alone, after all, means one does virtually nothing for a client other than present an ill-informed judgment about a plea bargain. But if minimal investigation alone contrasts with a procedural claim option, by choosing the latter the attorney at least does *something* for the client — something, in fact, that may get the case dismissed.

Cross pen and camera experiments discussed above); *see also* Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 Texas L. Rev. 77, 95 (1977) (discussing related psychological research as an explanation for settlement behavior in civil cases).

Again, unlike consumer behavior, attorney performance is somewhat guided by professionalism norms that should counteract some effects of context dependence. Yet the resource constraints of practice gradually modify background assumptions of professional conduct, making the contrast with professionalism less stark, and the minimal investigation approach more acceptable. Relying on recent insights from theories of norms[18] and social influence[19] to explain criminal, legal, and other social behavior, we might expect that regular players in local courts revise professionalism norms downward — to accommodate scarce resources — by not holding their colleagues in low esteem for cutting corners. Indeed, they may reward with high esteem those who help the system run quickly with minimal litigation effort.[20] The calculus involving professionalism, material constraints, and norms becomes even more complex when one considers additional factors that attorneys juggle, consciously or not. Those include experienced intuition about the strength of a procedural claim in a given forum; hunches about outcomes of investigation efforts or other factors that affect judgment of trial success (including the class and race of parties, which may affect credibility judgments);[21] and trade-offs among cases, so that one can put more effort into a few especially worthy cases. The insights of choice theory, set in a system of constrained resources, suggest how systemic pressures work at the behavioral level to make inadequate practice seem to meet *working* definitions of professionalism, in large part because long-term practice constraints have gutted the formal content of written standards.[22]

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18. *See, e.g.*, Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) (offering an "esteem theory" of norm development); *see also* Daniel Kahneman, *Reference Points, Anchors, Norms, and Mixed Feelings*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 296, 307-08 (1992) (noting that behavior is judged more acceptable as it becomes more frequent and when contrasted with worse alternatives).

19. *See, e.g.*, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 352-61 (1997) ("The concept of social influence . . . [explains] that individuals tend to conform their conduct to that of other individuals.").

20. A first-person account by a scholar who was formerly both a prosecutor and defender suggests this to be the case. *See* Lynch, *supra* note 10; *see also* Luban, *supra* note 4, at 1745 ("[W]idespread practices of perfunctory advocacy on the part of defenders exert enormous gravitational force . . . even when a defense counsel wants to do a job that is not perfunctory.").

21. *See* Richman, *supra* note 2.

22. *See* Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES 177, 198-202, 211-14 (Robert L. Nelson et al. eds., 1992) (describing how "[w]orkplace contexts develop widely varying and often mutually contradictory 'local versions' of professionalism").

We can do a better job of developing a more sophisticated understanding of the varied institutional dynamics of practice settings, and of working to integrate that knowledge into lawyer training. Compare our knowledge of, say, the legislation process to our knowledge of advocacy practice. Legal and political science scholars have developed a very sophisticated description of legislatures in action built on the insights of game theory, empirical and historical research, and various modes of legal scholarship. Far from describing legislators as merely civic-minded agents voicing the views of their constituent majorities in a process that yields outcomes reflecting a majority of the agents' votes, we understand the disproportionate influence of small but extremely committed interest groups, the practice of logrolling, the effect of agenda-controlling procedural rules on substantive outcomes, and voting structures that yield an illusory majority preference among multiple options.[23]

Our understanding of law practice in resource-starved settings like state criminal courts is not nearly as complex, and the focus of legal pedagogy reflects that. Once we recognize that attorneys may make strategic choices with important substantive consequences among basic advocacy tasks as well as among tasks that define the outer boundaries of zeal, we see a need for more guidance (and self-awareness) of those decisions. Simon has provided some of the most insightful commentary on the substance of discretionary lawyering decisions.[24] We need comparable insights with regard to the forced choices among basic advocacy tasks, if such ethical guidance is feasible in contexts of excessive scarcity. Stuntz provides a compelling description of how those decisions are likely to be made without changes in circumstances or — just perhaps — attorney training.

Legal education may be built upon an implicit bias — the model of attorneys practicing in comparatively prosperous settings such as

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23. *See, e.g.*, KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 46-60 (2d ed. 1963); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 38-62 (1991) (explaining Arrow's Theorem); DENNIS MUELLER, PUBLIC CHOICE II 63-65, 87-89 (1989); Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines*, 47 HAST. L.J. 1255, 1277-81 (1996) (reviewing criticisms of legislatures); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2128-37 (1990) (reviewing literature and criticizing public choice theory critiques of democratic processes).

24. In addition to Simon, *The Ethics of Criminal Defense*, *supra* note 4, see William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); *see also* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985).

corporate firms, where resource constraints and the professional dilemmas they create are less stark. Legal scholarship and teaching need to give more guidance to new attorneys about how to mediate the conflicts between practice conditions and professional standards. By assuming ethical edicts alone will compel attorneys to overcome structural barriers to competent practice, we risk facilitating practices that aggravate the disconnection between case outcomes and substantive merits. I suspect there are many practitioners who do not realize that the triage methods they have adopted in strained practice settings are causing them to make the choices Stuntz identifies: to choose procedural claims over fact-intensive merit claims, and — I would suggest at least as strongly as Stuntz — to choose plea bargains over plausible procedural claims. Closer attention to contextual pressures and the practices they engender may help scholars and teachers better prepare attorneys for the tremendous transition from acontextual, slow-motion study of practice in law schools to the real-world political economy of client representation.