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PROFILES

REMEMBERING WILLIAM KUNSTLER

SEAN M. MAHER*

In our age there is no such thing as "keeping out of politics." All issues are political issues, and politics itself is a mass of lies, evasions, folly, hatred and schizophrenia.¹

Crime. Prison. The death penalty. Three strikes and you're out. Mandatory minimum sentences. Habeas reform. These are catch words and phrases in the current political discussion of crime. These words are used repeatedly by a vocal and powerful segment of our society that believes, or at least would have us believe, that the solution to crime is a combination of imprisoning and exterminating more people, imposing longer prison sentences, and paring away individual constitutional protections in criminal trials and appeals. William Kunstler, who passed away on September 4, 1995 at the age of seventy-six, vehemently disagreed with these so-called solutions to crime and spent his career as a lawyer fighting on behalf of "the damned, those whom society wants to destroy."²

Born on July 7, 1919, in New York City, Bill was the first child of Monroe Bradford Kunstler and Frances Mandelbaum Kunstler. Bill was a rebellious youngster who received D's and F's throughout elementary school. Bill survived his rambunctious childhood and later graduated from DeWitt Clinton High School in New York City, from Yale University, and, after serving in the army during World War II, from Columbia Law School.

After completing law school, Bill worked for Macy's department store in New York City and then went into private practice with his brother, Michael. For about the first decade of his legal career, Bill handled a typical small partnership caseload: wills, trusts, estates, taxes, and commercial matters.

In 1960, Bill began to write a book about Caryl Chessman, who was executed by the State of California for violating its "Little Lindbergh" law, making abduction a capital offense. While in Los Angeles to publicize his book about

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¹ GEORGE ORWELL, *Politics and the English Language*, in SHOOTING AN ELEPHANT 89 (Harcourt, Brace and Company, 1950).

² WILLIAM M. KUNSTLER WITH SHEILA ISENBERG, MY LIFE AS A RADICAL LAWYER 313 (1994).

Chessman, entitled *Beyond a Reasonable Doubt?*, Bill received a phone call that would change his life forever. Rowland Watts of the ACLU asked Bill to fly to Jackson, Mississippi to work on behalf of the Mississippi Freedom Riders. Bill quickly agreed, a decision that marked the beginning of a life-long fight against injustice and political repression.

Bill eventually became famous as a defense attorney who represented a special type of "criminal:" progressive or left-wing political leaders. In the Chicago Seven trial, Bill defended Abbie Hoffman, Jerry Rubin, and Dave Dellinger from charges that they conspired to subvert the 1968 Democratic Convention by inciting riots throughout Chicago. During the course of his unparalleled career, Bill represented such legendary political figures as Martin Luther King, Jr., Malcolm X, Adam Clayton Powell, Marion Barry, Leonard Peltier, H. Rap Brown, Assata Shakur, Stokely Carmichael, Tom Hayden, and the Berrigans.

Bill often proclaimed that he never represented a client he didn't love, a sentiment that frequently enraged many when he steadfastly and zealously defended infamous "regular criminals." For instance, while I was a law clerk at Kunstler & Kuby, Bill and his law partner, Ron Kuby, were defending Colin Ferguson, who was charged with shooting over twenty people on the Long Island Railroad. Bill and Ron did not deny that Ferguson shot the passengers; however, they contended that Ferguson was legally insane. The case generated tremendous publicity, particularly once Bill and Ron revealed the "Black Rage" insanity defense, which was really just a small twist on an otherwise cut and dry insanity defense. According to Bill and Ron, Ferguson, who was born and raised in relative affluence in Jamaica, had a pre-existing mental disorder, probably paranoid schizophrenia. After attending private schools in Jamaica, Ferguson came to the United States for university studies. In the United States, Ferguson experienced home-grown American racism, the likes of which he never experienced in Jamaica. The trauma, stress, and dehumanizing effects of American racism led to a deterioration of Ferguson's already tenuous mental health, just as the trauma of seeing a family member die, losing a job, or any other stressful experience can touch off a psychotic episode from one already suffering from particular forms of mental illness. Many journalists, lawyers, and other individuals misunderstood the Black Rage defense as somehow providing a justification for any Black person to commit any crime without fear of punishment. Rather, it provided a rational explanation for the irrational acts of violence committed by a small minority of Black people who already have a serious pre-existing mental illness that is then exacerbated by the trauma of acute experiences of racism. Bill and Ron received death threats both through the mail and over the phone for their representation of Ferguson. On the eve of trial, Ferguson fired Bill and Ron and proceeded at trial on his own, *pro se*, with the permission of the court. As was demonstrated at trial by his confusing, erratic, and outright bizarre behavior, Ferguson clearly had severe mental problems that brought even his competency to make basic decisions into serious doubt. Nonetheless, the trial judge permitted Ferguson to continue his hapless "defense" in front of the jury, which in turn quickly decided to convict him on all counts.

As controversial as the Long Island Railroad case was, Bill once said that no other case generated more hostility towards him than his defense of the "squeegee men" in Lower Manhattan. The "squeegee men" were, and still are, a group of homeless men who walk up to cars stopped at red lights, squirt some water on the windshield, wipe it off with a squeegee, and hope to be paid some money for their service. Apparently, multitudes of car-driving New Yorkers were furious that Bill and Ron would dare try to defend the "squeegee men" when such an obvious infringement of the constitutional right not-to-be-squeegeed was taking place.

Bill saw no dichotomy in handling both "political" and "regular" criminal cases. For Bill, there was no simple way of labeling a person a "criminal" because the demarcation of criminal behavior rests upon political value judgments of how society should be. For example, according to recent statistics, one out of three African-American males are in prison, on probation, or on parole.³ One can interpret this statistic as merely a reflection of the number of "criminals" in African-American communities, or, more properly, one can view this "crime" statistic as a symptom of a larger ill: the economic and political disenfranchisement of African-Americans throughout our country. For Bill, the staggering numbers of African-Americans in trouble with the law was not a reflection of the "criminality" of African-Americans, but was an explosive political issue to be addressed by eradicating disparities in economic and political power between African-American communities and more affluent white communities. After all, is there any doubt that if one out of three white males from families with a yearly income of at least \$100,000 found themselves in jail or on probation, that federal and state funding for education, drug prevention, and rehabilitation services would skyrocket? In fact, state and federal legislators probably would rewrite dozens of statutes to lower the number of affluent white persons incarcerated as well as to decrease the severity of punishment for those still convicted.

The death penalty vividly demonstrates the inextricable link between crime and political value judgments of who is worthy of a second chance and who should be exterminated from the human community. As a law clerk at Kunstler & Kubly, I worked on the case of Robert Nelson Drew, a case Bill and Ron began on appeal in 1984. Drew, a native of New Hampshire, hitched a ride in Texas and proceeded to drive through Texas with three other men. According to the prosecution, Drew and one of the other passengers stopped the car, ordered one of the fellow passengers out of the car, and then stabbed him to death. Drew maintained his innocence and asserted that although he left the car with the co-defendant and the other passenger, it was the co-defendant who killed the victim. The only witness at trial was the fourth occupant of the car, who testified that he watched from inside the car as Drew slashed the victim's throat. Later, after Drew was convicted, that witness admitted that he did not actually

³ See *One-third and Rising*, THE ECONOMIST, June 8, 1996, at 25 (citing the Sentencing Project, a Washington, D.C.-based penal reform group).

see who committed the act. In addition, the co-defendant admitted that he committed the murder alone and that Drew did not participate.

Unfortunately for Drew, the startling new evidence of his innocence emerged 101 days after his conviction. At the time, Texas had a "thirty-day rule," which provided that new evidence discovered more than thirty days after a conviction could not be used to challenge a conviction. Adhering to this draconian procedural bar, all state and federal appeals courts, including the Supreme Court of the United States, refused even to consider the highly probative evidence of Drew's innocence, and allowed the state of Texas to kill Drew on August 2, 1994. On the death warrant, the sentencing judge drew a smiley face next to his signature.

For ten years, Bill and Ron fought to get the courts to listen to the evidence of Drew's innocence. By the time I began working with them, the execution date was set. In the days before the execution, letters and faxes from around the world flooded the office pleading for the Texas Board of Pardons and Paroles to stay Drew's execution. Letter writers ranged from Nobel Peace Prize winners to members of the European Parliament to Christians in New Hampshire. We compiled the letters, copied them, and bound them into books to be sent to the Texas Court of Criminal Appeals and Board of Pardons and Parole.

As August 2, 1994 approached, Bill became quite irritable and high strung. Many people remember the public Bill, the Bill Kunstler who stood unflinching as the cameras of the world focused on him in numerous battles with cantankerous judges, malevolent prosecutors, and hostile crowds. As Robert Drew's execution day neared, no cameras caught Bill crying at his desk for a man condemned to die by a system that valued "judicial efficiency" over human life.

Bill was an extraordinary attorney and I was privileged to see him at work in front of a jury, before a judge, and in the lights of the cameras. As a clerk for Bill, I could not help but learn about the law and the art of lawyering. Those lessons were invaluable. As the years pass, I fear that I may not remember all that I learned, but that potential loss will always be insignificant compared to that which will stay with me forever: Bill's courage, dedication, and optimism.

In describing what made him decide to put his stable law practice on the backburner and to throw himself into the chaos surrounding the Freedom Riders in the South, Bill wrote the following:

I recalled the words of Justice Oliver Wendell Holmes: "As life is action and passion, it is required of a man that he should share the passion and action of his time, at peril of being judged not to have lived." When [I was asked] to go South [and represent the Freedom Riders], I was forty-two and decided that when I was old and looked back on my life, I didn't want to discover that I had merely existed.⁴

I remember Bill received a call one day to do an interview with a foreign journalist. On the scheduled day, the journalist arrived and began the interview. As I sat in my cramped space in the corner, one interchange riveted my attention. The journalist asked Bill to discuss his political philosophy. Bill refused to

⁴ KUNSTLER & ISENBERG, *supra* note 2, at 102.

label himself beyond stating that he distrusted all governments because of their inherent authority to subjugate people. He then described how his view of the world was greatly shaped by Herman Melville's classic, *Moby Dick*. In *Moby Dick*, Captain Ahab obsessively pursues the white whale. At the end of the story, the white whale destroys Captain Ahab and his entire crew, except Ishmael, the youngest crew member, who survives to go back out to sea. This, Bill, said, represents the human condition. We must continually fight injustice, aware that we will have losses and eventually die in the process, but being buoyed by the knowledge that there will be others to follow our steps, just as we follow in the steps of those who came before us.

