Denver Law Review

Volume 81 | Issue 2 Article 3

January 2003

Bill Beaney's Continuing Relevance

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FOREWORD

BILL BEANEY'S CONTINUING RELEVANCE

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I am honored to contribute this brief essay in honor of my friend, colleague, and mentor, William Beaney. His recent passing brings great sadness to all of us in the University of Denver community. Yet, as with the end of every well-lived life, this sober occasion provides us with an opportunity to reflect on the manner in which that life touched us as individuals and as a community. It also allows us to look back on the broader national significance of a rich professional career.

I had the privilege of getting to know Bill in the later years of his life. Bill formally "retired" in 1989, three years before I joined the College of Law faculty. Fortunately for me, as well as for the entire DU community, Bill continued to teach as an emeritus professor until just a few years ago. He also continued to read and think about thorny issues of constitutional law and theory, provide thoughtful comments on drafts of law review articles, and patiently mentor at least one novice constitutional law professor. This was an extraordinary level of professional activity for someone who was supposedly winding down his career.

Indeed, a remarkable feature of Bill's career as one of the nation's leading constitutional law scholars and teachers was not only its longevity—he took his first teaching position in 1949—but also its substantial influence on multiple generations of judges, lawyers, and legal scholars. Perhaps, however, I should dispense with the past tense, for there appears to be no slowing down now. Bill remains influential in the legal world and likely will always be so. This essay is a tribute to Bill Beaney's continuing relevance.[1]

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† Professor, University of Denver College of Law. B.A., Case Western Reserve University, 1982; J.D., Stanford Law School, 1985. Thanks to the Denver University Law Review for inviting me to share these thoughts. I can think of no better tribute to Bill Beaney's legacy than to publish these observations in a scholarly journal.

1. This essay focuses on Bill's contributions to both the course of law and the academic world. In doing so, I do not mean to diminish Bill's numerous other professional and personal accomplishments, including his selfless military service, the public service he provided through numerous roles as a consultant to various government agencies, his institutional citizenship on behalf of the University of Denver (Bill twice served as Acting Dean for the College of Law and provided institutional support in numerous other ways, both large and small), or the bonds he established with his family and close friends.

I. THE INFLUENTIAL CONSTITUTIONAL LAW SCHOLAR

I am embarrassed to confess that I had never heard of Bill Beaney before I entered the academic world. While other renowned constitutional law scholars received greater recognition in the national community and grabbed the attention of the media, Bill's national influence was quieter, though no less powerful.

Over the course of his career, Bill exhibited three signal characteristics of a great legal scholar. First, he was incredibly prolific. Even a brief glance at Bill's record of legal scholarship should be jaw dropping to any legal academic.[2] Bill wrote, coauthored, or edited multiple books about the law and more than a dozen major law review articles. That list does not even include the numerous studies and reports Bill produced for government agencies or other shorter expositions about important legal topics.

Second, Bill's scholarship was of tremendous quality. As even a casual reader of his work could discern, his research was exhaustive, his analysis both incisive and rigorous, and his approach balanced and thoughtful. He was also an elegant writer. Even on the most technical of subjects, his prose is flowing and lucid. These qualities of Bill's scholarly work were recognized not only by several of the nation's most prestigious law reviews, but also by the academic presses, which published his widely influential scholarship in political science and law.

Another mark of the quality of Bill's work is that it continues to be cited regularly. A recent search on the electronic Westlaw database re-

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2. *See, e.g.*, WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955) [hereinafter, BEANEY, RIGHT TO COUNSEL]; William M. Beaney, *John Marshall Harlan: A Modern Conservative Justice*, *in* AN ESSENTIAL SAFEGUARD: ESSAYS ON THE UNITED STATES SUPREME COURT AND ITS JUSTICES 121 (D. Grier Stephenson, Jr., ed., 1991); William M. Beaney, *The Supreme Court: The Perspective of Political Science*, *in* MAX FREEDMAN ET AL., PERSPECTIVES ON THE COURT 34 (1967); William M. Beaney, *Justice William O. Douglas: The Constitution in a Free Society*, 51 IND. L.J. 18 (1975); William M. Beaney, *Fairness in University Disciplinary Proceedings*, 22 CASE W. RES. L. REV. 390 (1971); William M. Beaney, *The Warren Court and the Political Process*, 67 MICH. L. REV. 343 (1969); William M. Beaney, *Students, Higher Education and the Law*, 45 DENV. L.J. 511 (1968); William M. Beaney, *The Griswold Case and the Expanding Right to Privacy*, 1966 WIS. L. REV. 979 [hereinafter, Beaney, *Expanding Right of Privacy*]; William M. Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROBS. 253 (1966) [hereinafter, Beaney, *Privacy and American Law*]; William M. Beaney & Edward Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, 13 J. PUB. LAW 475 (1964); William M. Beaney, Comment, *The Right to Counsel: Past, Present, and Future*, 49 VA. L. REV. 1150 (1963); William M. Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212 (1962) [hereinafter, Beaney, *Constitutional Right of Privacy*]; William M. Beaney, *Right to Counsel Before Arraignment*, 45 MINN. L. REV. 771 (1961); William M. Beaney, *Teaching of Law Courses in the Liberal Arts College: A View from the College*, 13 J. LEGAL EDUC. 55 (1961); William M. Beaney, *Civil Liberties and Statutory Construction*, 8 J. PUB. LAW 66 (1959). Bill also coauthored a number of books with his Princeton colleague, the equally renowned Alpheus Mason. *See* ALPHEUS THOMAS MASON & WILLIAM M. BEANEY, AMERICAN CONSTITUTIONAL LAW: INTRODUCTORY ESSAYS AND SELECTED CASES 516 (6th ed. 1978); ALPHEUS THOMAS MASON & WILLIAM M. BEANEY, THE SUPREME COURT IN A FREE SOCIETY (1959).

veals 162 law review articles citing Bill's scholarship.[3] This number is even more impressive given that Westlaw databases have a modern bias because they do not include older publications. Accordingly, most of these citations are in recent work. Moreover, leading constitutional scholars in the present generation of academics continue to refer to Bill's work.[4]

Finally, Bill's research demonstrated great breadth. The scope of his work within constitutional law, which, during the heyday of his career, included the field that we now call "criminal procedure," is noteworthy. Bill wrote about numerous substantive constitutional law topics, including due process, privacy, school prayer, and the right to counsel. He also wrote tomes and gave lectures about bridging the gap between law and political science. In fact, it is the interdisciplinary nature of Bill's work that led Dean Robert Yegge to recruit him from the Princeton political science department to our faculty in the late 1960s (a decade after Bill turned down an offer from Dean Edward Levi to be appointed to the faculty of the prestigious University of Chicago School of Law).[5] Bill was deeply interested in how law and society intersected in ways meaningful both to the study of law and to the betterment of society.[6] His interdisciplinary approach to law was spurred by his belief that there was no meaningful difference between the study of government and political science and the study of law and that the connections between law and politics were to be explored, not ignored.[7]

But fairly evaluating Bill Beaney's scholarly contributions must go farther than mere quantitative and qualitative assessment and extend to an examination of their influence on the development of constitutional law. Bill's continuing relevance clearly emerges from a brief look at these topics.

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3. List on file with author.

4. *See, e.g.*, David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1745 n.65 (2003), Rebecca L. Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491, 1503 n.55 (2002); Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1092 n.13 (2000); Louis Michael Seidman, Book Review, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2293 n.74 (1998).

5. *See* Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 LAW & SOC'Y REV. 409, 428 (1998).

6. *See, e.g.*, WILLIAM M. BEANEY ET AL., DENVER PLEA BARGAINING REDUCTION PROJECT: AN EVALUATION (1979) (study with Professors Larry Tiffany and Joyce Sterling examining possible impact of program restricting plea bargaining). For a description of Bill's place in the Law and Society movement, see Garth & Sterling, *supra* note 5, at 426-28.

7. For excellent historical accounts of Bill Beaney's place in this important intellectual movement, see Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 663 n.216 (1994) (noting that "[t]wo excellent examples of the perspective of political scientists in the post-World War II era regarding the political nature of the Supreme Court are found in the 1965 Rosenthal Lecture given by political scientist William M. Beaney and in Mason's and Beaney's textbook."); Garth & Sterling, *supra* note 5, at 426-28.

Bill's work unquestionably influenced the courts. His scholarship was cited in United States Supreme Court opinions in eleven cases over a span of 41 years.[8] Notably, Supreme Court Justices cited Bill in landmark cases in two of the substantive areas about which he wrote most extensively -- the constitutional right of privacy and criminal defendants' right to counsel. In *Griswold v. Connecticut*, Justice Douglas's majority opinion referred to Bill's privacy scholarship in its now famous section discussing the "penumbra" of rights emanating from the specific freedoms guaranteed by the Bill of Rights.[9] In *Miranda v. Arizona*, Justice Harlan's dissent drew upon Bill's widely cited book on the right to counsel in describing the background against which the law of confessions was developed.[10]

Indeed, Bill's work foreshadowed the development of much of the Court's constitutional privacy jurisprudence. For example, in a seminal article published three years before the Court decided *Griswold*, he observed that "[i]n a sense virtually all enumerated rights in the Constitution can be described as contributing to the right of privacy, if by the term is meant the integrity and freedom of the individual person and personality."[11] Noting that Justice Douglas, who would later write the majority opinion in *Griswold*, had made such an argument in his published writings, Bill also anticipated the potential weaknesses of this "penumbra" approach.[12] After surveying the historical developments of the Court's Fourth Amendment jurisprudence as a source of a constitutional privacy right, Bill concluded that privacy might better be grounded in the Fourteenth Amendment's Due Process Clause and its protection of "liberty."[13] This analytical framework essentially traces, in advance, the trajectory of the Supreme Court's privacy cases that would be decided over the next forty years.[14]

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8. *See* Neder v. United States, 527 U.S. 1, 31 (1999) (Scalia, J., concurring in part and dissenting in part); Mitchell v. United States, 526 U.S. 314, 335 (1999) (Scalia, J., dissenting); Lassiter v. Dep't of Social Services, 452 U.S. 18, 52 n.20 (1981) (Blackmun, J., dissenting); Scott v. Illinois, 440 U.S. 367, 370 (1979); Faretta v. California, 422 U.S. 806, 831 n.42 (1975); United States v. Wade, 388 U.S. 218, 224 n.2 (1967); Time, Inc. v. Hill, 385 U.S. 374, 380 n.3 (1967); Miranda v. Arizona, 384 U.S. 436, 520 (1966) (Harlan, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 569 n.7 (1963) (Douglas, J., concurring); Cicenia v. La Gay, 357 U.S. 504, 510 (1958), overruled in part by Escobedo v. Illinois, 378 U.S. 478, 492 (1964) and abrogated by Miranda v. Arizona, 384 U.S. 436, 479 (1966).

9. *Griswold*, 381 U.S. at 485 (citing Beaney, *Constitutional Right of Privacy*, *supra* note 2).

10. *Miranda*, 384 U.S. at 520 (Harlan, J., dissenting) (citing BEANEY, THE RIGHT TO COUNSEL, *supra* note 2).

11. Beaney, *Constitutional Right of Privacy*, *supra* note 2, at 214.

12. *Id.* ("Apart from requiring a coverage of virtually all of the recognized constitutional rights, such a category involves the use of a new concept in situations where adequate, if imperfect, categories under which analysis can proceed already exist.").

13. *Id.* at 248.

14. *Compare* Griswold v. Connecticut, 381 U.S. 479, 483-85 (1965) (locating privacy right in penumbra emanating from specific provisions of the Bill of Rights), *with* Roe v. Wade, 410 U.S. 113, 153 (1973) (finding woman's privacy right in termination of early term pregnancies in liberty

What is more, Bill's scholarship anticipated and supported many important developments in the constitutional approach to individual privacy rights that would emerge over this period. In 1966, he articulated his vision of constitutional privacy as follows: "Not all of mankind desire or need privacy, but for those who do, a freedom to determine the extent to which others may share in one's spiritual nature, and the ability to protect one's beliefs, thoughts, emotions, and sensations from unreasonable intrusions are of the very essence of life in a free society."[15] Last term, in the path-breaking privacy decision in *Lawrence v. Texas*, Justice Kennedy, echoing Bill Beaney's views, observed that:

> [A]dults may choose to enter upon . . . [private consensual sexual relationships] in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[16]

Another way in which Bill influenced and anticipated the development of constitutional law is through his understanding about the necessity for the Supreme Court to adopt a fluid understanding of constitutional meaning. As he wrote in a post-*Griswold* article:

> The relevant values of society, its changing needs and demands, and the roles assumed by other agencies of government all seem to influence the way the Court perceives its function. In this sense, the Constitution resembles less a contract to be literally applied, and instead begins to appear as a statement of political principles, to be interpreted and applied by the Court in the light of changing circumstances.[17]

Or, as Bill put it more simply, "law cannot be static, unless a society is also static."[18] In these observations, Bill foreshadowed a recent trend on the Supreme Court of looking to changes in the non-judicial world as one source for defining important constitutional rights.[19]

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component of due process clause) *and* Lawrence v. Texas, 123 S. Ct. 2472, 2476-84 (2003) (finding right of privacy for same sex couples engaged in consensual sexual relationships in liberty component of due process clause).

15. Beaney, *Expanding Right of Privacy*, *supra* note 2, at 995.

16. *Lawrence*, 123 S. Ct. at 2478.

17. Beaney, *Expanding Right of Privacy*, *supra* note 2, at 986.

18. Beaney, *Privacy and American Law*, *supra* note 2, at 255.

19. *See, e.g.*, *Lawrence*, 123 S. Ct. at 2480-83 (drawing upon changes in societal acceptance of consensual gay relationships and upon developments in other western legal systems in defining the scope of liberty); Atkins v. Virginia, 536 U.S. 304, 313-17 (2002) (viewing pattern of state law opposition to execution of mentally retarded persons as relevant to determination of whether such executions constitute cruel and unusual punishment barred by Eighth Amendment).

Moreover, Bill understood well before it was obvious that privacy law would have to develop in response to significant technological advances that enable government actors to acquire and catalogue important, personal information about citizens. In one piece, he wrote:

> Since we are entering the age of total information as a result of the efforts of scientifically-minded administrators in business, government, and throughout our society; and since the technical means for efficient gathering, storing, and retrieval are readily available, this may turn out to be a significant battleground testing the limits of privacy of information against the demand of the government "to know."[20]

Criminal procedure scholars now take this point for granted. But Bill wrote these words in 1966, a year before the Supreme Court even decided *Katz v. United States*,[21] in which Justice Harlan's famous concurrence established that government conduct is limited by the Fourth Amendment only where the person subject to that conduct has a "reasonable expectation of privacy" as defined by societal understandings.[22] That test has spawned many contemporary privacy debates, ranging from the constitutionality of police use of infrared thermal imaging technology[23] to government surveillance of private telephone and email communications.[24]

Looking back at Bill's impressive record of scholarship, it is clear that he left behind a rich and meaningful body of work that current and future generations of judges and professors can continue to draw upon for insight and guidance. Bill Beaney's scholarship has continuing relevance.

II. THE PATIENT MENTOR

Bill Beaney was much more than a brilliant legal scholar. He was also a giving and gracious colleague, a model institutional citizen.

In 1992, when I joined the faculty of the University of Denver College of Law, I thought I knew a fair amount about constitutional law. After all, by that time I had studied constitutional law with some of the nation's leading experts, clerked for a federal judge, and spent several years as a lawyer with the American Civil Liberties Union, where my

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20. Beaney, *Expanding Right of Privacy*, *supra* note 2, at 991.

21. 389 U.S. 347 (1967).

22. *Katz*, 389 U.S. at 360-61 (Harlan, J., concurring). A majority of the Court has since adopted Justice Harlan's approach. *See, e.g.*, California v. Ciraolo, 476 U.S. 207, 211 (1986).

23. *See* Kyllo v. United States, 533 U.S. 27, 34-40 (2001) (holding that government use of thermal imaging technology to detect heat from a private home is a search protected by the Fourth Amendment).

24. *See, e.g.*, Laurie Thomas Lee, *The USA Patriot Act and Telecommunications: Privacy Under Attack*, 29 RUTGERS COMPUTER & TECH. L.J. 371 (2003) (discussing privacy implications of USA Patriot Act's electronic surveillance provisions).

docket exclusively consisted of constitutional litigation. As many a young law teacher quickly learns, however, even an experienced practitioner generally knows only some facets of his or her field and usually cannot comprehend the breadth of knowledge necessary to becoming a good teacher. I was soon stunned by how little I knew about constitutional law.

Fortunately, there was someone on our faculty who did know a lot about constitutional law. I soon found myself visiting Bill Beaney's office on a regular basis, taking advantage of as many individual tutorials as he could bear. In my initial, rather sheepish, approaches, I would gather together specific interrogatories and Bill would fire off answers in a blink. Soon, however, I began to worry that I was something of a pest. Like the television character Columbo, I would return to Bill's office again and again, apologetically muttering, "Umm, Bill, could I ask you just one more question?"

Bill never made me feel stupid or ignorant, but patiently discussed the issues with me in a thoughtful manner. He treated me with respect, as a peer, rather than a neophyte. Whether he was explaining nuances of late eighteenth century political relationships or the incoherence of the Supreme Court's dormant Commerce Clause doctrine, he provided a rich and entertaining source of insight and information. Bill always had a twinkle in his eye when we got together. I have no illusions that this was because he particularly loved talking with *me*. Rather, it was clear to me that Bill loved talking about constitutional law.

Not only did Bill give his time generously to my teaching queries, but also he provided his insights on my own legal scholarship. When I gave him a draft of the first law review article I wrote as a law professor, I assumed that he would not have the time, inclination, or interest to provide me with any feedback. But he soon invited me to his office and gave me valuable and insightful substantive comments that enhanced my thinking and enriched my published work.

With his help, and a lot of hard work, I hope that I have overcome my initial professorial deficiencies. Bill taught me more than substantive doctrinal and historical knowledge, though. He taught me that a good constitutional law professor undergoes a constant learning process, always studying, examining, and reexamining his or her understandings of the manner in which constitutional law emerges and evolves. I have taken these lessons to heart and they will always influence my teaching and scholarship. As I wrote to him in the last days of his life, "Bill, you are with me every time I walk into a classroom to teach Constitutional Law." We will all miss you, but to me, you are still here. You will always be relevant.