The past several decades have seen a renaissance in criminal procedure as a cutting-edge discipline and as one inseparably linked to substantive criminal law. This renaissance can be traced in no small part to the work of a single scholar: William J. Stuntz. This volume brings together twelve leading American criminal justice scholars whose own writings have been profoundly influenced by Stuntz and his work. Their contributions consist of essays on subjects ranging from the political economy of substantive criminal law to the law of police investigations to the role of religion in legal scholarship—all themes addressed by Stuntz in his own work. Some contributions directly analyze or respond to Stuntz’s work, whereas others address topics or themes Stuntz wrote about from the contributor’s own distinctive perspective. Both as a tribute to Stuntz’s work and as a source of profound new insights, the book is a milestone in criminal justice literature.

Michael Klarman is the Kirkland & Ellis Professor of Law at Harvard Law School. Before that, he was the James Monroe Distinguished Professor of Law and Professor of History at the University of Virginia School of Law. Professor Klarman is the author of Brown v. Board of Education and the Civil Rights Movement (2007), Unfinished Business: Racial Equality in American History (2007), and From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (2004), which won the 2005 Bancroft Prize in American History.

David Skeel is the S. Samuel Arsht Professor of Corporate Law at the University of Pennsylvania Law School. He is the author of The New Financial Deal: Understanding the Dodd-Frank Act and Its (Unintended) Consequences (2011), Icarus in the Boardroom (2005), and Debt’s Dominion: A History of Bankruptcy Law in America (2001), as well as a number of articles, including several with Stuntz, on bankruptcy, corporate law, Christianity and law, gambling, and other topics. He also coauthored the blog “Less Than the Least” with Stuntz.

Carol Steiker is the Henry J. Friendly Professor of Law at Harvard Law School. She is the author of numerous scholarly works across the broad field of criminal justice, ranging from substantive criminal law to criminal procedure to institutional design, with a special focus on issues related to capital punishment. She has served on the editorial board of the The Encyclopedia of Crime and Justice (2nd ed., 2002), as the editor of Criminal Procedure Stories (2006), and as coauthor of the Kadish, Schulhofer, and Steiker casebook, Criminal Law and Its Processes (8th ed., 2007). Professor Steiker also has litigated on behalf of indigent criminal defendants, consulted for a variety of nonprofit organizations concerned with criminal justice issues, and served as an expert witness before Congress and state legislatures.
The Political Heart of Criminal Procedure

ESSAYS ON THEMES OF WILLIAM J. STUNTZ

Edited by

Michael Klarman
Harvard Law School

David Skeel
University of Pennsylvania Law School

Carol Steiker
Harvard Law School
We are grateful to Lauren Chitwood Schauf for her help and insight at every stage of this project, and to Anna Crowe and Juhyun Park for carefully reviewing the manuscript.

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2012

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data


p. cm.
Includes bibliographical references and index.
ISBN 978-1-107-01941-6 (hardback)

ISBN 978-1-107-01941-6 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.
# Contents

**Contributor List**  
Introduction: Appreciating Bill Stuntz  
*Michael Klarman, David Skeel, and Carol Steiker*  

**Part I: The Political Economy of Substantive Criminal Law**

1. The Political Economy of Capital Punishment  
   *Joseph L. Hoffmann*  
   29

2. Bill Stuntz and the Principal–Agent Problem in American Criminal Law  
   *Richard H. McAdams*  
   47

3. Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz  
   *Daniel Richman*  
   64

4. Stealing Bill Stuntz  
   *David Alan Sklansky*  
   87

**Part II: Police Investigations**

5. The Accidental Feminist  
   *Anne M. Coughlin*  
   111

6. The Distribution of Dignity and the Fourth Amendment  
   *Tracey L. Meares*  
   123

7. Why Courts Should Not Quantify Probable Cause  
   *Orin Kerr*  
   131
### vi Contents

8. DNA and the Fifth Amendment  
   Erin Murphy  
   144

PART III: EMOTION, DISCRETION, AND THE JUDICIAL ROLE

   Dan M. Kahan  
   163

10. Patrolling the Fenceline: How the Court Only Sometimes Cares about Preserving Its Role in Criminal Cases  
    Andrew D. Leipold  
    177

11. Three Puzzles in the Work of Bill Stuntz  
    Louis Michael Seidman  
    200

12. The Mercy Seat: Discretion, Justice, and Mercy in the American Criminal Justice System  
    Carol Steiker  
    212

13. Epilogue: Three Underrated Explanations for the Punitive Turn  
    Bill Stuntz  
    228

Index  
   231
Contributor List

Anne M. Coughlin Lewis F. Powell, Jr., Professor of Law and Joel B. Piassick Research Professor, University of Virginia School of Law.

Joseph L. Hoffmann Harry Pratter Professor, Indiana University Maurer School of Law.

Dan M. Kahan Elizabeth K. Dollard Professor, Yale Law School.

Orin Kerr Professor, George Washington University Law School.

Michael Klarman Kirkland & Ellis Professor of Law, Harvard Law School.

Andrew D. Leipold Edwin M. Adams Professor, University of Illinois College of Law.

Richard H. McAdams Bernard D. Meltzer Professor, University of Chicago Law School.

Tracey L. Meares Deputy Dean and Walton Hale Hamilton Professor of Law, Yale Law School.

Erin Murphy Professor of Law, New York University School of Law.

Daniel Richman Paul J. Kellner Professor of Law, Columbia Law School.

Louis Michael Seidman Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center.

David Skeel S. Samuel Arsh Professor of Corporate Law, University of Pennsylvania Law School.
Contributor List

David Alan Sklansky Yosef Osheawich Professor of Law, University of California, Berkeley.

Carol Steiker Henry J. Friendly Professor of Law, Harvard Law School.

Bill Stuntz Former Henry J. Friendly Professor of Law, Harvard Law School.