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DOES PRIVACY REALLY HAVE A PROBLEM IN THE LAW OF CRIMINAL PROCEDURE?

Daniel Yeager**

INTRODUCTION

In Privacy’s Problem and the Law of Criminal Procedure, and, to a lesser extent in The Substantive Origins of Criminal Procedure, William Stuntz praises the Supreme Court for again having begun to align criminal procedure with modern constitutional law by de-emphasizing privacy interests and emphasizing the right to be free from unjustified police coercion.

Nonetheless, according to Stuntz, the Court and leading commentators like Wayne LaFave still worry too much about “trivial” privacy interests in jacket pockets, glove compartments, cigarette packets, paper bags, and the underside of stereos, while leaving police violence such as confronting suspects, grabbing them, punching them in the face, or killing

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** Professor, California Western School of Law. I thank Karen Beretsky, Sherry Colb, Don Dripps, Barry Friedman, Paul Gudel, Toni Massaro, Chris Slobochin, Steve Smith, William Stuntz, and George Thomas, III for their helpful comments on draft versions of this Article. I also thank Heather Lamberg for her excellent research assistance and Erik Wals for his thoughtful editing.
3. See Privacy’s Problem, supra note 1, at 1068-78; Substantive Origins, supra note 2, at 433-42.
4. See Privacy’s Problem, supra note 1, at 1063.
them, severely under-regulated. For Stuntz, it is the violence or coerciveness of police encounters with criminal suspects that distinguishes police investigations from regulatory, privacy-implicating inspections of tax evaders, polluters, lawless schoolchildren and government employees, unsafe workplaces, and sub-par housing.\(^5\)

In both articles, Stuntz sets out to reconcile the criminal and regulatory worlds in a privacy sense. Considering the lack of privacy protection against an IRS that investigates sensitive matters such as our charitable donations,\(^6\) we may be better off abandoning the privacy protection we are currently afforded in our glove compartments. Stuntz posits that the existence of police coercion justifies proscribing the criminal and regulatory regimes differently because they inflict themselves on us differently, though the difference is more related to the presence or absence of violence than to privacy. For example, as hostile as the Internal Revenue Code may be to privacy, IRS forms do not rough us up. Accordingly, privacy makes sense in modern constitutional law terms mostly as a protection against “traumatizing” face-to-face encounters with police.

Michael Seidman has commented on the first of these two recent additions to Stuntz’s impressive oeuvre. In *The Problems with Privacy’s Problem*,\(^8\) Seidman observes that the world that Stuntz’s coercion thesis imagines, one which puts freedom from coercion above privacy, really *is* the world in which we live.\(^9\) Seidman and Stuntz differ only on the degree of truth in Seidman’s observation.

The position I have staked out, contrariwise, agrees with Stuntz’s conclusion that privacy retains a significant position in the law of criminal procedure. From there I try to defend a

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5. See id. at 1032, 1057; *Substantive Origins*, supra note 2, at 433-37.
6. See *Privacy’s Problem*, supra note 1, at 1033; *Substantive Origins*, supra note 2, at 444-45.
7. See *Privacy’s Problem*, supra note 1, at 1024.
9. See id. at 1087 (stating that the Supreme Court’s “focus is precisely where Stuntz says it should be: on violence, disruption, and humiliation”).
privacy-oriented procedural regime that can be reconciled with an activist regulatory state. Part One of this Article suggests that the comparatively light judicial supervision of police coercion owes more to the conditions under which force is used than to what Stuntz views as the Court's indifference to what police do to us, or to its “obsession” over what police can see and hear. By redescribing questions of privacy, or questions of privacy and coercion, merely as questions of coercion, Stuntz's attempt to correct the law of criminal procedure misfires linguistically and practically. The attempt misfires linguistically because “coercion” is used in an extended sense, and practically because his thesis can contribute only marginally, if at all, to the reduction of police violence. Part Two explores the semantical distinctions between secrecy, privacy, and coercion in order to reclaim what Stuntz rejects: a right to be free from certain modes of police spying. Finally, Part Three argues that regulatory actions are distinguishable from police actions not solely by their lack of violence or coerciveness, but on grounds that Stuntz sloughs off: that groups and individuals are different. The collective power of groups explains why we join them and why we fear them and also explains why groups are more vulnerable than individuals to meddlesome investigative practices.

I. THE COERCION THESIS

Stuntz's gripes are primarily with the Fourth Amendment's regulation of searches and seizures. As he acknowledges, the Fifth Amendment's regulation of confessions betrays a permissiveness toward trickery and bogus waivers that leaves little sway for privacy and other soft norms. Even with the Fourth Amendment, Stuntz quietly exempts from the “problem with privacy” the privacy-based holdings that prohibit unjustified ransackings of houses and warrantless electronic eavesdropping. He says those are unrepresentative of what police really do. More typical police actions that vex Stuntz involve the

10. See Privacy's Problem, supra note 1, at 1070-71.
11. See id. at 1060-62.
12. See id. at 1062. Although the vast majority of searches are conducted without a warrant, this by no means makes warrant searches
"plain view" doctrine and the "frisk" portion of Terry v. Ohio (both of which constrain police more than norms that regulate police use of force), jailing of suspects after warrantless arrests, consent searches, and police "stalking" of suspects. For Stuntz, the operation of these rules demonstrates that there is too much privacy and too much coercion in police practices.

Although Stuntz worries that the Fourth Amendment makes too much of what police may see and hear and not enough of what they do to us, he does recognize that police can see and hear a lot. On a whim, police can hover over your property in airplanes or helicopters, sift through your garbage, study your bank and phone records, trespass onto your property, use your friends as undercover agents, and track your movements with transmitters hidden in your effects. True, police need a good reason to look in your glove compartment, cigarette packet, jacket pocket, paper sack, and the underside of your stereo, and an even better
reason to get into your house. While this hardly sounds like a greedy sense of privacy, Stuntz is right to say that when inspectors are after tax evaders, polluters, lawless schoolchildren and government employees, or operators of unsafe workplaces and owners of sub-par housing, the constraints on what they may see and hear are measurably looser.

But is he right to justify the looser constraints because police rough us up but inspectors do not? Police do use force. If they did not, then "seizure" and "arrest" would be empty terms. As to when and how much force they may use, Stuntz says the Court's answers are "thin," even "close to nonexistent."

I disagree. Coercion is adequately, though imperfectly, regulated. In attempting to prove that it is not, Stuntz is too brisk and too dependent on a sense of "coercion" that stretches the word all out of shape. Ironically, Stuntz ends up demonstrating the connection between privacy and coercion in Fourth Amendment law, though it is his stated intention to decouple them.

Moving from the most to the least violent, Stuntz's examples of the under-regulated world of police coercion include: 1) various seizures, such as killing a fleeing felon, roughing up a diabetic, or terrorizing innocent homeowners while an absent and not-so-innocent relative is sought; 2) consent searches; 3) police stalking of suspects, where police track

248 (1991)).

33. See id. at 1022-23 (discussing Arizona v. Hicks, 480 U.S. 321 (1987)).

34. See id. at 1024 (citing Payton v. New York, 445 U.S. 573 (1980)).

35. See California v. Hodari D., 499 U.S. 621, 626 (1991) (stating that an arrest "requires either physical force . . . or, where that is absent, submission to the assertion of authority"). But see SAN DIEGO COUNTY SHERIFF'S DEP'T, DETENTION FACILITY SERVICES MANUAL OF POLICIES AND PROCEDURES, SECURITY AND CONTROL, ¶ 1.89, at 1 (1993) ("Placing handcuffs on an inmate in a department-approved manner, when the inmate is not resisting, would not be considered a use of force.").

36. Substantive Origins, supra note 2, at 446.

37. See Privacy's Problem, supra note 1, at 1043 (discussing Tennessee v. Garner, 471 U.S. 1 (1985)).

38. See id. at 1043-44 & n.93 (discussing Graham v. Connor, 490 U.S. 386 (1989)).

39. See id. at 1066-68 (discussing Anderson v. Creighton, 483 U.S. 635 (1987)).

40. See id. at 1063-65 (discussing Florida v. Jimeno, 500 U.S. 248
their movements, and 4) the “plain view” doctrine, under which police may seize evidence they find while doing something else. Stuntz objects that these doctrines betoken the Court’s indifference to police coercion. His proof lies in the infrequency with which the Court reaches the merits of claims of police coercion, and in the fuzzy reasonableness standard that leaves police and suspects unsure of what the law demands of them on the street. Professor LaFave’s treatise does not help either, according to Professor Stuntz, with its heavy tilt in favor of privacy norms.

The payoff here is disappointing, not just because Stuntz misreads LaFave, but because requiring police to act reasonably, that is, not negligently, in rapidly unfolding street encounters is all we can do, a fact which Stuntz affirms and denies at once. Indeed, Stuntz’s point would have been more convincing a decade ago than it is today.

Until 1985, when the Court decided Tennessee v. Garner, only conscience-shocking uses of deadly force would be struck

(1991)).
41. See id. at 1023 (discussing United States v. Knotts, 460 U.S. 276 (1983)).
42. See id. at 1022-23 (discussing Arizona v. Hicks, 480 U.S. 321 (1987)).
43. See id. at 1043-44; Substantive Origins, supra note 2, at 446.
44. See Privacy’s Problem, supra note 1, at 1043 & n.92, 1066 & n.182, 1068.
45. In discussing LaFave’s work, Stuntz says LaFave gives “almost no discussion of limits on the degree of force used in conducting an otherwise permissible search” and only “brief treatment of excessive force claims.” Id. at 1066 n.182 (citing 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.2 (2d ed. 1987 & Supp. 1995)). But LaFave does address these issues. See 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.1(d) (2d ed. 1987 & Supp. 1995) (discussing the use of force during an arrest); id. § 5.2(i) (discussing the use of force to obtain evidence); 3 id. § 8.2(b) (discussing the use of force in consent cases); id. § 9.2(d) (discussing the use of force in Terry stops); id. § 9.2(h) (discussing what force amounts to a seizure). The latest edition further expands the sections on force. See 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.3(a)-(e) (3d ed. 1995).
46. See Privacy’s Problem, supra note 1, at 1073-75 (affirming that even vague standards, though problematic, are better than no standards); id. at 1043-44 (arguing that the Court should focus on defining unreasonable coercion).
down, and then on grounds unrelated to the law of seizures.\footnote{48} Since \textit{Garner}, states may not authorize police to "seize an unarmed, nondangerous suspect by shooting him dead."\footnote{49} Instead, the suspect must be believed to be armed or to have committed a violent felony, and burglary with the intent to commit petty theft does not qualify.\footnote{50}

What more can be done? Since the only \textit{desirable} action would be to catch the suspect or talk him into turning himself in,\footnote{51} police should try to do so, or consider those options, before resorting to shooting the suspect. When shooting is the only option, warning shots or aiming low obviously are preferable to shooting to kill. Nothing in \textit{Garner} \textit{specifically} requires as much, and that is a mistake.\footnote{52} If that is what Stuntz means to criticize,\footnote{53} then I agree. I doubt, however (as does Stuntz),\footnote{54} that deadly-force standards could be fashioned into

\footnote{48. See Johnson v. Glick, 481 F.2d 1028, 1029, 1033-34 (2d Cir. 1973) (holding that a single spontaneous incident of striking, grabbing and threatening a prisoner did not shock the conscience and thus the complaint failed to properly state a claim against the warden).


50. \textit{See id.} at 5. Specifically, the Court stated "[w]hile we agree burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force. . . . in fact, the available evidence demonstrates that burglaries only rarely involve physical violence." \textit{Id.} at 21.

51. \textit{Compare} LEO KATZ, \textit{BAD ACCTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW} 65-66 (1987) ("To acquit someone on grounds of necessity is to approve, support, applaud what he did. It is to find his actions \textit{justified}.") and George P. Fletcher, \textit{Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Law Theory}, 8 ISR. L. REV. 367, 373 (1973) ("We 'applaud' the justified actor's 'judgment' on choosing the superior value.") \textit{with} J.L. Austin, \textit{A Plea For Excuses, in PHILOSOPHICAL PAPERS} 176 (J.O. Urmson & G.J. Warmock eds., 3d ed. 1979) (to justify an action is "to give reasons for doing it, not to say to brazen it out, to glory in it, or the like").

52. \textit{See Garner}, 471 U.S. at 11-12 ("Thus, if the suspect threatens the officer with a weapon or there is some probable cause to believe that he has committed a crime involving the infliction of . . . serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, \textit{some warning} has been given.") (emphasis added).

53. \textit{See Privacy's Problem, supra note 1, at 1043-44; Substantive Origins, supra note 2, at 446.}

54. \textit{See Privacy's Problem, supra note 1, at 1073-75.}
narrow rules.\textsuperscript{55}

The same can be said of non-deadly-force standards. In a 1989 case, \textit{Graham v. Connor},\textsuperscript{56} where police mistook a diabetic for a belligerent drunk, the Court held that the scope of a seizure must be tied to its justification, or must be, in a word, reasonable.\textsuperscript{57} This requirement may not control police violence as effectively as would improved recruitment, training, and supervision,\textsuperscript{58} but what would Stuntz suggest be done? In the footnote he devotes to \textit{Graham}, Stuntz notes, before dismissing it as empty, that \textit{Graham} invented a balancing formula that weighs the quantum of force against resistance, flight, and the apparent dangerousness of the suspected offense and offender.\textsuperscript{59} Again, what exactly is wrong with that?

Most assuredly, an obstreperous suspect who increases the difficulty of making a peaceable seizure is situated differently than a compliant suspect.\textsuperscript{60} Just \textit{how} differently is a bit under-articulated as the relevance of flight is discussed only in Scalia's Bible-citing \textit{dictum} in \textit{California v. Hodari D.}\textsuperscript{61} As mentioned above, when they can, police should threaten force to induce compliance before using force; but otherwise, the reasonableness of police violence is unalterably contingent on facts, not rules. And because here, as so often is the case, we see how wobbly appellate litigation is at controlling police, it may be better to consign the business of more detailed rule-articulation to administrative control.\textsuperscript{62} Yet even administra-

\textsuperscript{55} See infra note 62 and accompanying text.
\textsuperscript{56} 490 U.S. 386 (1989).
\textsuperscript{57} See id. at 396-99.
\textsuperscript{58} See \textsc{Christopher Slobochin}, \textsc{Criminal Procedure: Regulation of Police Investigation} 1-35 (1993).
\textsuperscript{59} See \textit{Privacy's Problem}, supra note 1, at 1043 n.93; \textit{Substantive Origins}, supra note 2, at 446 n.239.
\textsuperscript{60} Cf. United States v. Sharpe, 470 U.S. 675, 687-88 (1985) (explaining that a brief detention may be prolonged by a suspect's own actions).
\textsuperscript{62} See \textsc{Kenneth Culp Davis}, \textsc{Discretionary Justice} 57-59 (1969) (arguing that when the legislature fails to provide specific standards, administrators should create guidelines on their own); Anthony G. Amsterdam, \textit{Perspectives on the Fourth Amendment}, 58 \textsc{Minn. L. Rev.} 349, 414-31 (1974) (proposing, like Davis, that search and seizure should be conducted in conformity with reasonably particular legislation or police-made rules). See also Wayne R. LaFave, \textit{Controlling Discretion by Admin-
tive efforts to articulate precisely when and how force may be used unavoidably collapse into abstract standards. For in-
stance, the San Diego Police Department's well-intentioned, four-level "Force Continuum" establishing the conditions for, inter alia, the use of "impact strikes with a defensive impact weapon to the head, face and throat" ends up only admonishing that "force which is . . . unreasonable or excessive is pro-
hibited."63

Another area where Stuntz sees the need to beef up regulation of police coercion is in the detention of suspects who are arrested without a warrant and await a judge's ruling on the validity of the arrest.64 Not long ago that practice was intolerably loose and individualized. For example, when Florida jailed a suspect for fifteen days solely on a police officer's authority,65 the Court said the suspect's probable cause hearing was unreasonably delayed, but offered no advice as to what it meant by "prompt" or "timely."66 In 1991, however, the Court intervened to entitle arrestees to a judicial determination of probable cause within two days, and even faster if the delay is in bad faith.67 Although the Court could have gone further by adopting the one-day maximum that Scalia proposed in his dissent,68 the rule the Court did adopt makes a categorical, Miranda-type attempt at clarity which acknowledges that a suspect's liberty is even more precious than scarce judicial resources.

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64. See Privacy's Problem, supra note 1, at 1024 & n.31.
66. See id.; Gerstein v. Pugh, 420 U.S. 103, 125-26 (1975) (establishing that the probable-cause determination for pretrial detention must be made either before or promptly after arrest).
67. See County of Riverside v. McLaughlin, 500 U.S. 44, 56-57 (1991) (holding that when the probable-cause determination occurs later than 48 hours after arrest "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance").
68. See id. at 68-70 (Scalia, J., dissenting).
If the forty-eight-hour rule has a blind spot regarding coercion, it is the admissibility of confessions made once the opportunity for a timely probable cause hearing has lapsed. Nothing meaningful has come from the Court on this, though not for lack of opportunity. Since a suspect cannot make himself or probable cause disappear once they materialize, regulating excessively lengthy detentions is at bottom a question of the exclusionary rule’s effect on confessions obtained after the two days have run. Oddly, the Court’s multi-factored “fruits” formula from Brown v. Illinois holds that time reduces the spell that unconstitutional arrests cast on suspects. As LaFave insists, however, languishing in police custody increases, not decreases, the pressure on suspects. For commentators to continue to urge the Court to correct this misconception is, I imagine, just what Stuntz would want.

From these paradigmatic examples of coercion, which address the manner and length of detentions, Stuntz’s coercion thesis moves to more problematic examples, which extend our ordinary understanding of coercion. One such example is his angle on consent searches, which are justified if police first get permission from someone whom they reasonably think can grant it. A familiar consent case that Stuntz talks about is

70. See United States v. Crews, 445 U.S. 463, 474 (1980) (reiterating that a defendant “cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest”).
72. 422 U.S. 590 (1975).
73. See id. at 603-04. But cf. Gerstein, 420 U.S. at 114 (holding that “[o]nce the suspect is in custody . . . the suspect’s need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest.”).
74. See 4 LAFAVE, supra note 45, § 11.4(b) (stating that “the Court’s assumption that the mere passage of time between the arrest and the confession increases the likelihood of the confession being untainted is not sound. It ignores the possibilities for ‘exploitation’ inherent in the time lapse factor, and that the illegal custody becomes more oppressive as it continues uninterrupted.”).
75. See Thomas, supra note 71, at 447-52.
Florida v. Jimeno. There the Court ruled on the constitutionality of a Dade County police officer's search of Jimeno's car. The officer had stopped Jimeno for a minor traffic infraction and told him that drug activity was suspected. The issue was whether Jimeno's unqualified permission to search the car should be read to include a paper sack found on the floorboard. The majority admitted as evidence the cocaine found in the bag because Jimeno should have qualified his permission if that was what he meant. The dissent said that because closed containers are especially private, the officer should have stayed away from the paper sack, even without special limiting instructions from Jimeno.

Stuntz says that Rehnquist's majority and Marshall's dissent asked the wrong questions in Jimeno. Like jacket pockets, paper lunch bags are convenient, not private, according to Stuntz. If privacy is the issue, he goes on, then it is easy to see why Jimeno was denied relief. For Stuntz, the "real harm" in a case like Jimeno is not to privacy, but rather lies in

the indignity of being publicly singled out as a criminal suspect and the fear that flows from being targeted by uniformed, armed police officers. Street encounters are not like house searches. The harm flows not from the search but from the encounter. The question should not be whether the officer had the suspect's permission to look at something. Permission will always be more fictive than real anyway. Rather, the question should be whether the officer's behavior was too coercive given the reason for the encounter. It is not the reasonableness of looking in the paper bag that ought to matter;

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78. See id. at 249.
79. See id. at 251.
80. See id.
81. See id. at 251-52.
82. See id. at 253 (Marshall, J., dissenting).
83. See Privacy's Problem, supra note 1, at 1063.
84. See id. at 1064.
85. See id.
it is the reasonableness of treating Jimeno like he was a probable drug courier. By focusing on privacy and information gathering, the law fails to engage the real issue.\footnote{Id. at 1064-65.}

This instance of Stuntz's coercion thesis gives the Court too little credit. Both Rehnquist and Marshall know the real issue. Eighteen years earlier they were on opposite sides of another traffic-stop case, \textit{Schneckloth v. Bustamonte},\footnote{412 U.S. 218 (1973).} which held that consent to search is valid only in "the absence of coercion."\footnote{Id. at 227.} Rehnquist's thirty-page majority opinion mentions privacy just once, and then in the most generalized, clichéd terms.\footnote{Id. at 233, or to "express or implied," threats, id. at 227, does not constitute consent. In addition, factors relevant to the voluntariness of consent include "subtly coercive police questions, . . . the possibly vulnerable subjective state of the person who consents," id. at 229, and "the subject's knowledge of a right to refuse." Id. at 248-49.} Of the five other opinions in \textit{Bustamonte}, only Brennan's one-page dissent sees consent as a matter of privacy.\footnote{See id. at 242 ("The Fourth Amendment protects 'the security of one's privacy against arbitrary intrusion by the police . . . .'" (quoting \textit{Wolf v. Colorado}, 338 U.S. 25, 27 (1949)).} Coercion did not come up in \textit{Jimeno} because there was too little of it to make a difference. In fact, as both the Court\footnote{See \textit{Bustamonte}, 412 U.S. at 277 (Brennan, J., dissenting) ("The Court holds today that an individual can effectively waive this right even though he is totally ignorant of the fact that, in the absence of his consent, such invasions of his privacy would be constitutionally prohibited.").} and Stuntz\footnote{See \textit{Waiving Rights}, supra note 89, at 801-25 (discussing different contexts in which rights can be waived).} accept that an \textit{arrestee} can consent to being interrogated without raising questions of intolerable police coercion, it follows that \textit{Bustamonte} and \textit{Jimeno}, neither of whom was arrested, could

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obviously consent to searches of their belongings.

But suppose Jimeno's encounter was too coercive. Too coercive for what? For a traffic infraction? How much coercion does a traffic infraction call for? Certainly police can stop and ticket bad drivers. Jimeno's brief encounter featured no touching, no handcuffing, and no tough talk. So if it is not the stopping of bad drivers that is too coercive (otherwise we should scrap our vehicle codes), and if it is not the request to search the car that is too coercive (otherwise permission would be the real issue), then it must be the officer's telling Jimeno that he suspected him of drug activity that was too coercive. But again, too coercive for what? Jimeno presumably should not be able to bring a section 1983 suit against the officer for calling Jimeno a "drug-gie." So for the officer to get into the paper sack, the encounter must have been too coercive. Thus there is no way to untie the discovery of the cocaine from the question of whether the officer extorted Jimeno's permission.

Whether the issue is consent searches of paper bags or another problematic example of Stuntz's—police stalking of suspects—Stuntz pushes his sense of coercion too far. Asking someone for permission to search and apprising them, as in Jimeno, of their right to refuse, or following someone around, are police practices that lack even a family resemblance to what we mean when we say "police brutality." Like thunderstorms or some electric guitar riffs, these actions are coercive or violent only metaphorically. But to use "coercion" or "violence" metaphorically or specially, as Stuntz does, threatens to wipe out the very distinction on which he relies: that police rough us up, but inspectors do not.

If Stuntz thinks Jimeno was coerced, then I wonder what he makes of Colonnade Catering Corp. v. United States and United States v. Biswell, where inspectors conducted thorough, warrantless, nonconsensual searches of businesses that

93. See Donald A. Dripps, More on Distinguishing Sex, Sexual Expropriation, and Sexual Assault: A Reply to Professor West, 93 COLUM. L. REV. 1460, 1463 (1993) ("Of course, it is within the limits of the language to say that sex is violence. Thunderstorms are 'violent,' and so are electric guitar riffs.").
dealt in the heavily regulated worlds of liquor and firearms, respectively. In Colonnade, the Court invalidated a search and seizure by IRS agents who broke down a door without express statutory authorization, though dissenting Justice Black was convinced that congressional silence equals approval. In Biswell, the Court allowed local and federal inspectors to coerce Biswell's consent to search a storeroom because Congress said warrantless searches of firearms dealers were permissible. In a dissent with which I imagine Stuntz would agree, Justice Douglas complained that "a search conducted over the objection of the owner of the premises sought to be searched is 'forcible' whether or not violent means are used to effect the search."

Colonnade and Biswell are exotic, I know. Congress always provides, though the Court does not always require, that if the search victim objects to an inspection, then the inspector can get a warrant, or seek to punish, sue, or ban the objecting party from the activity, whether it be the liquor, arms, mining, or junkyard businesses, working for the government, or playing high school sports. So Stuntz is cor-

96. See Colonnade, 397 U.S. at 77 ("Under the existing statutes Congress selected a standard that does not include forcible entries without a warrant.").

97. See id. at 80-81 (Black, J., dissenting) (stating that federal statutes give IRS agents implied authority to use force to break open locked doors).

98. See Biswell, 406 U.S. at 314-15 ("When the officers asked to inspect respondent's locked storeroom, they were merely asserting their statutory right.").

99. Id. at 318-19 (Douglas, J., dissenting).

100. See Colonnade, 397 U.S. at 77 (invalidating warrantless, nonconsensual search of liquor store for failure to observe statutory limits on inspections).


103. SeeConnor v. Ortega, 480 U.S. 709, 725-26 (1987) (holding that a warrant is not required to search a government employee's work area if the circumstances are reasonable).

rect that police can lawfully coerce us more than inspectors can, but only in reference to police actions that comport with an ordinary understanding of "coercion" as opposed to the extended sense into which he falls. Stuntz's extended sense of coercion easily describes not only Colonnade and Biswell, but also encounters in which, for example, schoolteachers search students' belongings, inspectors enter private property to assess the safety or habitability of premises, or when public employers demand that employees produce blood or urine. In such instances, the students, managers, and employees feel coerced, even though they may refuse the search, and even if they have, as Stuntz states, "implicitly bargained" away their privacy. Indeed, is it really so evident that being followed around by police as you drive over public highways is more coercive than finding university officials rummaging through your desk at the public law school where you teach?

Nevertheless, characterizing the question in Jimeno as one of permission (as it is in Colonnade and Biswell) does not mean that Jimeno's case is only about privacy and not coercion. The case is about both, as are most search-and-seizure and confession cases. Consider, for instance, Chimel v. California, which held that the power to arrest includes a limited power to search the arrestee and the area immediately within his reach.

(stating the warrantless search of a student is permissible when the "government acts as guardian and tutor" in a reasonable manner).

105. See Waiving Rights, supra note 89, at 803, 807-14.

106. See New Jersey v. T.L.O., 469 U.S. 325, 343 (1985) (holding search of student's purse was reasonable).


109. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 677 (1989) (holding that a warrant was not needed to conduct government drug testing program).


If privacy were the only value promoted by limits on searches and seizures, then we should not permit any searches based solely on arrests absent some reason to believe the suspect has a weapon or will destroy evidence. But Chimel demands no such belief. If, conversely, liberty or freedom from coercion were the only protected value, then contemporaneous searches of arrestees would be more closely circumscribed than searches of their property, since aggressions against persons are worse than aggressions against property.112 But this is not the case. As decisions like Chimel suggest, there is no singular value sheltered by the Fourth Amendment.

Another example of the interplay between privacy and liberty interests and other “soft” norms113 in Fourth Amendment law is the meaning of “seizure.” A typical seizure takes place when police “intentionally”114 get a suspect to “submit to police authority”115 because he feels he is not “free to leave.”116 But when the suspect is at home, work, or otherwise constrained by his own itinerary and not by the actions of police, a seizure takes place only if the suspect feels as though he is not “free to decline the officers’ requests or otherwise terminate the encounter.”117 Clearly, these two formulations are different. Freedom to leave is literally a matter of liberty; freedom to terminate an encounter sounds more like a restatement of half of the Miranda118 rule—the half of Miranda that protects suspects’ privacy of thought rather than their freedom of move-

112. Compare CAL. PENAL CODE § 489 (Deering 1872 & Supp. 1995) (punishing grand theft with imprisonment not exceeding one year) with id. § 213 (punishing robbery with imprisonment up to 6 years).
113. See Daniel B. Yeager, Categorical and Individualized Rights-Ordering on Federal Habeas Corpus, 51 WASH. & LEE L. REV. 669, 669, 691-94 (1994) (stating that consideration of soft norms such as privacy, liberty, dignity, consensuality, participation, adversariness, and a preference for enlightened investigative techniques arguably oppose the criminal trial’s purpose of determining factual guilt).
116. Terry v. Ohio, 392 U.S. 1, 16 (1968) (holding that whenever an officer “accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person”).
ment. The very fact that the Court's "seizure" rule has two formulations is evidence that seizures, justified or not, invade both privacy and liberty interests at once.

Miranda, too, is a clear and high example of the interplay of privacy and liberty interests in criminal procedure. Asking suspects "where were you last night?" compels them to talk, but only when they are in custody. Likewise, placing suspects in custody means nothing to Miranda unless police try to get them to "fess up." The harder police push with their questioning, the more physical constraint suspects will sense. Similarly, the greater their degree of physical constraint, the more vulnerable suspects will be to any police suggestion. In other words, police custody would not be so bad if police were not using it to get at suspects' private thoughts; nor would police be likely to get at suspects' private thoughts were it not for the pressures of custody. I am not suggesting that the Court's decisions in confession cases support my point; in actuality, they do not. Those cases often wrongly ignore that it is the interplay of both privacy and liberty interests—and neither alone—that makes un-Mirandized statements presumptively compelled and therefore inadmissible. Yet, despite the affinity of privacy and liberty interests, Stuntz denies their interrelation, not only by extending our ordinary sense of coercion, but, as I hope now to demonstrate, by compressing our ordinary sense of privacy.

119. See id. at 460 (finding a right of a "private enclave" where a private life may be led).
120. Id. at 536 (White, J., dissenting).
121. See Thompson v. Keohane, 116 S. Ct. 457, 465 (1995) (declaring "two discrete inquiries are essential to the determination [of custody]: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.").
II. SECRECY, PRIVACY, AND COERCION

Sweet Mephistopheltes, so charm me here / That I may walk invisible to all / And do whate’er I please unseen of any.
Christopher Marlowe, Doctor Faustus  

To get a fuller view of the coercion thesis and its consequences, more must be known about Stuntz’s thoughts on encounterless or nonconfrontational police actions. If Stuntz is correct—that protection of paper sacks and other closed containers should be a matter of freedom from coercion and not a matter of privacy—does that mean he approves of closed container searches if the suspect is absent or does not see the search take place? How would the coercion thesis interpret the acts of a police officer who, in a place he has a right to be, on a whim opens Robinson’s cigarette package, Belton’s zippered jacket pocket, Lafayette’s shoulder bag, or Jimeno’s paper sack? This, by the way, is what Officer Biro did in United States v. Ceccolini. Was Biro’s snooping an unjustified search because it was an envelope in which he looked? So there are private and nonprivate, worthy and unworthy closed containers? That cannot be the law. Please recognize

125. See Privacy’s Problem, supra note 1, at 1064-65 (declaring that the “real question” in search and seizure cases is “whether the officer’s behavior was too coercive”).
131. See id. at 280-81 (holding that an officer’s unconstitutional discovery of “policy slips” in an envelope did not require suppression of the testimony of a witness who was discovered because of the officer’s unlawful search).
that Stuntz is not duplicating Scalia's position in *California v. Acevedo*\textsuperscript{133}—that container searches should take place on probable cause without regard to the nature of the container.\textsuperscript{134} Instead, Stuntz's coercion thesis requires no antecedent suspicion at all to authorize encounterless or nonconfrontational invasions of closed containers.\textsuperscript{135}

To get a sense of Stuntz's overemphasis of the significance of encounters or confrontations with police, consider *United States v. Knotts*.\textsuperscript{136} In that case, the seller of a can of chloroform allowed police to place an electronic beeper in the can so they could track it and its possessors. The Court held that the use of the beeper was not a search of the can or the car in which it traveled because the beeper did nothing that visual surveillance could not.\textsuperscript{137} Here again, Stuntz thinks the Court misses the point. To Stuntz, *Knotts* is a case about stalking.\textsuperscript{138} The driver of the car knew police were following him, so he felt coerced into driving evasively.\textsuperscript{139} But suppose the driver did not know he was being followed. In that case, Stuntz would say that no search occurred because the sense of coercion is missing.

There is something strange about saying that spying must be "felt" in order to be wrong. This is not to say that undetected spying is as bad as stalking; it probably is not. Stalking describes the constant, one-sided spying that made Bentham's Panopticon—a work camp where inmates knew a guard would surveil them from a central tower into which the prisoners could not see—such a brilliant method of control, without the high costs of a dungeon's isolation.\textsuperscript{140} But as punitive as

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\textsuperscript{133} 500 U.S. 565 (1991).
\textsuperscript{134} See id. at 584 (Scalia, J., concurring in the judgment).
\textsuperscript{135} See generally Privacy's Problem, supra note 1, at 1068-79 (presenting applications of the coercion thesis to search and seizure cases).
\textsuperscript{136} 460 U.S. 276 (1983).
\textsuperscript{137} See id. at 285.
\textsuperscript{138} See Privacy's Problem, supra note 1, at 1023-24.
\textsuperscript{139} See id. at 1024.
stalking may be, it only partially captures what is wrong with spying. Greek myth has it that Gyges, a barbarian, succumbed to the king of Lydia's requests that he spy on the king's own wife and "peruse her person" while she undressed.\(^{141}\) Gyges knew well the old saying "[l]et each look on his own,"\(^{142}\) or, in the queen's words, to not "behold what is not lawful for you."\(^{143}\) So when he "gazed on her nakedness," Gyges knew he acted "wickedly."\(^{144}\) Certainly what made Gyges's actions unjust had nothing to do with his being caught. Thus not only is Justice Stevens correct when he says that "[a] bathtub is a less private area when the plumber is present even if his back is turned,"\(^{145}\) but the reverse is true as well: the plumber's presence ruins the privacy of even a blind or inattentive bather. Spying does lose some of its aggressiveness when it is undetected, though it remains aggressive to the extent that we fear being spied on,\(^{146}\) but unde-

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141. See HERODOTUS, THE PERSIAN WARS, Chs. 8-10 (George Rawlinson trans., 1942).
142. Id. ch. 9.
143. Id. ch. 11.
144. Though less so than he would later, when, under pressure from the queen, he sneaked into the royal chamber and fatally stabbed the sleeping king. See id. chs. 8-14.

In Plato's The Republic, Glauc...
tected spying never loses its privacy-bashing essence.\textsuperscript{147} Stuntz acknowledges the harm of undetected spying by exempting two “paradigmatic” encounterless searches from his thesis: house searches and wiretaps.\textsuperscript{148} But why exempt them? Stuntz explains that the contents of houses and phone conversations are “personal”\textsuperscript{149} and “plausibly distinguishable from the kinds of information the state seeks for regulatory purposes,”\textsuperscript{150} though elsewhere he admits that “[t]here is no privacy-based reason for treating [regulatory] searches differently from police searches; the overbreadth phenomenon\textsuperscript{151} is the same in both settings.”\textsuperscript{152} Despite this wrinkle, for Stuntz it makes sense in privacy terms that police need a very good reason to raid our houses or intercept our phone calls.

The coercion thesis thus leaves some room for privacy without coercion, but only for “good secrets,” which concern what we do and keep in our houses and what we say on the phone, as opposed to “bad secrets,” which concern those outside-the-house facts like the concealment of a sandwich in a paper sack. But even the house loses some of its luster in Stuntz’s regime. For example, Stuntz says that Arizona v. Hicks\textsuperscript{153} depicts the Court’s obsession with secrecy.\textsuperscript{154} Hicks instantiates the “plain view” doctrine, which allows police to seize evidence as a bonus if they discover it while lawfully searching for or seizing something or someone else.\textsuperscript{155} In Hicks, the Court held that a police officer who lawfully entered Hicks’s apartment soon

\textsuperscript{147} Cf. Massiah v. United States, 377 U.S. 201, 206 (1964). In Massiah, the Court quoted with approval the following language from Judge Hays’s dissent in the court of appeals: “Massiah was more seriously imposed upon because he did not even know that he was under interrogation by a government agent.” United States v. Massiah, 307 F.2d 62, 72-73 (2d Cir. 1962) (Hays, J., dissenting), rev’d, 377 U.S. 201 (1964).

\textsuperscript{148} See Privacy’s Problem, supra note 1, at 1060-62.

\textsuperscript{149} Id. at 1063.

\textsuperscript{150} Id. at 1061.

\textsuperscript{151} Seidman calls the injury to privacy caused by the overbreadth phenomenon “collateral damage.” Seidman, supra note 8, at 1086-92.

\textsuperscript{152} Privacy’s Problem, supra note 1, at 1039.


\textsuperscript{154} See Privacy’s Problem, supra note 1, at 1022-23 (discussing Hicks, 480 U.S. at 321).

\textsuperscript{155} See Hicks, 480 U.S. at 321.
after Hicks had shot his neighbor through the floor could look only for Hicks absent independent probable cause to look for something else.\textsuperscript{156} While there, the officer also peeked under Hicks's turntable to get the serial numbers to find out if the two fancy stereos in the "squalid" apartment were stolen, which they were.\textsuperscript{157} Because the officer lacked probable cause that the stereos were stolen, moving a turntable for inspection was an unjustified search.\textsuperscript{158} As a result, Hicks got away with theft, but not with the stereos.

Stuntz objects to Hicks, which he reads as saying that "each marginal search, each additional place where the officer casts his eye, represents a separate issue and ought to be separately justified."\textsuperscript{159} We are wrong, Stuntz insists, to privilege Hicks's right to keep a stereo's serial numbers secret over his right to be free from unjustified invasions of his home and from police coercion (which, like Hicks himself, was absent).\textsuperscript{160} Thus for Stuntz, what matters in Hicks is not the officer's roving eye, but "the legality of the search of the apartment in general."\textsuperscript{161}

But searches are never general.\textsuperscript{162} Surely Stuntz is not saying that the right to enter a house is the right to ransack it. Stuntz knows that searches must be carried out, not just initiated, in a reasonable manner.\textsuperscript{163} Stuntz also knows that an officer can cast his eye anywhere he wants—that's why we call

\textsuperscript{156} See id. at 326.
\textsuperscript{157} See id.
\textsuperscript{158} See id.
\textsuperscript{159} Privacy's Problem, supra note 1, at 1023.
\textsuperscript{161} Privacy's Problem, supra note 1, at 1023.
\textsuperscript{162} See, e.g., Maryland v. Garrison, 480 U.S. 79, 84 (1987) (requiring a description of the particular place to be searched before a warrant may be issued); Cupp v. Murphy, 412 U.S. 291, 295 n.2 (1973) (stating that when conducting a warrantless search the officer's action must be reasonably related to the circumstances which justified the search in the first place).
\textsuperscript{163} See Privacy's Problem, supra note 1, at 1066-68 (pointing out that the Court in Anderson v. Creighton, 483 U.S. 635 (1987), and many commentators fail to discuss the Fourth Amendment implications of the officer's conduct during the search).
it "plain view." To be sure, the police had good cause for being in Hicks's apartment, but unless they thought Hicks, or his gun, was hiding beneath or behind the turntable, they were no more justified in moving the stereo than they would have been in pumping Hicks's stomach or looking for him in a jewelry box. The serial numbers were hidden, so the "view" was not at all "plain." Perhaps what annoys Stuntz is that where the police looked, like an "open field," was not "likely to contain the sorts of things ordinary people wish to keep to themselves." But how could the police know that nothing private would be there? A turntable can hide a love letter or an ACLU membership card, each bespeaking facts that in no sense trivialize what we mean by "private."

Although the meaning of "private" is wider than the meaning of "secret," Stuntz uses the terms interchangeably. Stanley Cavell employs a less stingy or more ordinary definition of private when he writes that "[a] private conversation is one that I do not want others to hear, not one they necessarily cannot hear. My private entrance is one through which I can invite others; in principle, anyone in the world can be as well acquainted with it as I am." While Cavell's reflections are meant to capture a metaphysical as opposed to political sense of privacy, still he reminds us that privacy largely depends on the intentions of the interest-holder. We may safely assume that, to paraphrase Edward Shils, those who intend to conceal mean to control the outward flow of information about themselves, regardless of whether the information is embarrassing and regardless of the unimagined risks that eavesdropping and betrayal pose. But generous conceptions of priva-

164. See id. at 1023 n.28 (recognizing that the violation in Hicks did not arise from where the officer looked, but from what he moved).

165. Id. at 1029. But see id. at 1030 (stating that "houses, unlike fields, do contain things that most people want to keep to themselves").


168. See United States v. White, 401 U.S. 745, 752 (1971) ("Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their
cy like Cavell's, Shils's, Brandeis's familiar "right to be let alone,"\textsuperscript{169} or even the one found in \textit{Florida v. Riley},\textsuperscript{170} are too open for Stuntz, too hard to pin down. They are, as such, too easily converted into an obsession over what police may see and hear.

At its worst, privacy is a greedy concept that promotes hypersensitivity or an unjustified wish to manipulate and defraud others. Here I borrow from Judge Posner, who, like Stuntz, is less skeptical of seclusional claims, i.e., our right to retire from the public to the private, than he is of secrecy or informational claims that do nothing but enhance one's reputation by keeping others in the dark unless the secret or information has some innovative or entrepreneurial component.\textsuperscript{171} If "good" privacy claims are seclusional and "bad" privacy claims are strictly secretive or informational, and provide no competitive advantage in a market, then does that mean closed containers such as cars, pockets, paper bags or cigarette packets ordinarily are not sources of seclusional interests? Because Stuntz thinks these places are about convenience, not privacy, he would replace privacy protection in containers with an emphasis on what police do to us to reveal the contents of those containers.\textsuperscript{172}

Obviously we are at an impasse: I say closed containers are private, in part because coercion is not the Fourth Amendment's only worry; Stuntz says they are not private because privacy invasions tend to matter only when they are occasioned by police coercion.\textsuperscript{173} If we treat this as an empirical problem in need of laborious questioning, Chris Slobogin

\textsuperscript{169.} Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

\textsuperscript{170.} 488 U.S. 445 (1989). In \textit{Riley}, Justices O'Connor, Blackmun, Brennan, Marshall, and Stevens agreed we have a right to be free from unusual modes of spying.


\textsuperscript{172.} See \textit{Privacy's Problem}, supra note 1, at 1065-66; \textit{Substantive Origins}, supra note 2, at 440-42, 446.

\textsuperscript{173.} See \textit{Privacy's Problem}, supra note 1, at 1065-66.
and Joseph Schumacher's survey strongly implies that closed containers are private.¹⁷⁴ But because Stuntz's aim is to impose coherence on modern constitutional law, he must foreclose on the privacy of closed containers.¹⁷⁵

For Stuntz, an adequate account of why there is more privacy protection in criminal, as opposed to regulatory, modes of investigation must lie outside of the meaning and operation of "privacy."¹⁷⁶ Thus we get his coercion thesis, whose force depends on redescribing questions of privacy, or questions that implicate privacy and coercion not to mention property,¹⁷⁷ merely as questions of coercion. The upshot of Stuntz's coercion thesis is to regulate less, not more, police actions, e.g., encounterless quests for evidence, and to contribute only nominally to the control of police violence.¹⁷⁸ Moreover, I doubt that Stuntz's strategy is the only way to reconcile the criminal and regulatory worlds.

III. INDIVIDUALS AND INSTITUTIONS

By now we know that Stuntz believes there is too much privacy and too much coercion in criminal procedure. Part of his proof that criminal suspects have too much privacy is that landlords, manufacturers, public employees, and schoolchildren have so little.¹⁷⁹ According to Stuntz, the loose constitutional constraints on regulatory inspections rightly minimize privacy, whereas the tighter constraints on criminal investigations

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¹⁷⁴. Christopher Slobogin & Joseph E. Schumacher, Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society," 42 DUKE L.J. 727, 737-64 (1993) (confirming that while we place the most cherished privacies of life in our phone conversations and our houses, which contain our books and papers, searches of office drawers, trunks of cars, footlockers found in cars, and of schoolchildren's lockers were also rated as significantly invasive).

¹⁷⁵. See supra note 3 and accompanying text.

¹⁷⁶. See Privacy's Problem, supra note 1, at 1044.


¹⁷⁸. See Privacy's Problem, supra note 1, at 1071-78.

¹⁷⁹. See id. at 1038-39.
wrongly maximize privacy. This does not mean, he adds, that criminal and regulatory quests for evidence should be identically constrained. They should not, he continues, not because of divergent privacy interests in the two settings, but because criminal investigations depend on coercive police-suspect encounters that are in dire need of judicial control. Thus, insofar as police rough us up but inspectors do not, it makes sense to Stuntz that inspectors can get away with more suspicionless or low-suspicion evidence-gathering than police can.

As Stuntz says, regulatory inspectors’ advantages over police are evident in the Court’s cases which have held that: 1) corporations and other institutions have no privilege against self-incrimination and “only slight” Fourth Amendment protection; and 2) individuals often are forced to prepare and produce incriminating documents and other evidence. Stuntz argues that these doctrinal moves, among others, were a matter of “political necessity” because “government cannot be very activist if it cannot force people to tell it things.” So force us it does, and often with little or no suspicion, even though the police cannot do the same (not without a good reason), and even though, depending on how we measure harm, the need to bring murderers, rapists, and robbers to book may be greater than the need to force compliance with regulatory schemes enforced by agencies such as the IRS, FTC, EPA, and OSHA. Stuntz considers and rejects seven possible explanations for this discrepancy before offering his own: the coerciveness of most police practices is not reduplicated in regu-

180. See id. at 1054-60.  
181. See id. at 1034-47.  
182. See id. at 1050-53 (discussing Shapiro v. United States, 335 U.S. 1 (1948), Marron v. United States, 275 U.S. 192 (1927), and Hale v. Henkel, 201 U.S. 43 (1906)).  
183. Id. at 1053.  
184. Id. at 1054.  
185. See id. at 1035-36.  
186. See id. at 1034-47. The seven categories are 1) categorical balancing, 2) drawing lines between individuals and institutions, 3) the search-subpoena line, 4) the right-privilege distinction, 5) separating disclosure to the government from disclosure to the public, 6) privacy as a remedy, not a right, and 7) representation reinforcement. See id. at 1035-44.
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latory contexts. 187

But is that really the difference? If we removed from Stuntz's proof every case that involves self-disclosure and institutions, there would be very little left of the regulatory war on privacy he describes. 188 Tax laws and subpoenas coerce us; however, this coercion is justifiable because both entail actions by, not just against, the suspect. 189 (Is this not essential to Kafka's Der Prozess? Not only that K. may be causing, acting, doing, but that if he were not, it would not be a "process" at all?) 190 This participatory element is especially striking with subpoenas, which have the added procedural virtue of being susceptible to ex ante challenge. 191

Yet for Stuntz, what justifies the coercion of self-reporting requirements and subpoenas is that neither entails potentially violent face-to-face encounters. When Stuntz moves away from instances of self-disclosure to regulatory cases involving face-to-face encounters between inspectors and their search victims, his previously noted extended sense of coercion is certainly wide enough to cover what goes on there. 192 I agree with Stuntz that regulatory inspections are rarely violent, 193 and

187. See id. at 1060-77.
189. Cf. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 157 (1968) ("[T]he alleged criminal is not merely an object to be acted upon but an independent entity in the process who may, if he so desires, ... play an active role . . . . ").
190. See FRANZ KAFKA, DER PROZESS (Max Brod trans., 1935).
191. See United States v. Dionisio, 410 U.S. 1, 8-13 (1978) (noting that a grand-jury subpoena does not constitute an intrusion on privacy protected by the Fourth Amendment).
192. See supra notes 94-110 and accompanying text.
193. But see Ingraham v. Wright, 430 U.S. 651 (1976) (involving use of
that they can uncover facts more private than those uncovered in some police investigations.\(^{194}\) What I cannot join is Stuntz's belief that encounterless police investigations should be more loosely controlled so they are better aligned with regulatory inspections.

One explanation for why regulators can get away with actions that the police cannot is that institutions have fewer protections from various governmental actions than individuals do.\(^{195}\) Stuntz finds this explanation inadequate because institutions are fictive—they are composed of individuals whose rights do not or should not dissolve into their group membership.\(^{196}\) Moreover, in sharp contrast to the institutions to which they belong, individuals can feel "noneconomic, intangible harm . . . in pure dignitary terms," whether they are acting within or outside of the institution.\(^{197}\)

It is true, to be stingy with groups is to be stingy with their members: members, who, unlike the entity with which they identify, \textit{can} vote, bleed, and go to jail, but can't live forever. What Stuntz misses, however, is that the whole point of group economic action, particularly corporate action, \textit{is} to dissolve the individual. The exchange is literally profitable because it encourages individual investment in a free-market economy by limiting an investor's financial liability, unless the individual somehow subverts the group by ceasing to act for the group.\(^{198}\) Group membership confers power on individuals which they otherwise lack. Thus, the law presumes, and psychological evidence backs up, that "[t]wo heads are better than one," not that "[t]oo many cooks spoil the broth."\(^{199}\) Not only are groups more likely to get their way, but they also tend to monopolize social and economic opportunity and securi-

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\(^{194}\) See Privacy's Problem, supra note 1, at 1035-36; see also supra notes 94-110 and accompanying text.

\(^{195}\) See Privacy's Problem, supra note 1, at 1036-38.

\(^{196}\) See id. at 1037-38, 1053.

\(^{197}\) Id. at 1036-37.

\(^{198}\) See United States v. Dotterweich, 320 U.S. 277, 282 (1943) (noting that a corporate officer may be criminally liable for acts of corporation only when operating the corporation as his "alter ego").

\(^{199}\) KATZ, supra note 51, at 261.
ty. These virtues of groups are also their vices; they account not only for why we join them, but also for why we fear them. What else could explain why we jail anyone who merely asks or agrees with someone else to commit a crime?

Judge Posner has argued that "the trend toward elevating personal and downgrading organizational privacy is mysterious from an economic standpoint." To Posner, concealing one's arrest record is hardly more deserving of protection than concealing one's business plans and operations, which are, Posner complains, subject to the "public prying" of securities laws. But, as Ian Macneil points out, it is not securities laws or Leviathan in any other form that pose the greatest threat to personal or entrepreneurial secrecy. Rather, it is private groupings, particularly corporate bureaucracies relying on the power of contract—not Leviathan—that typically run roughshod over individuals. Even if Posner is right, that the law too steeply discounts the value of entrepreneurial secrecy, our laws betray a profound skepticism, if not paranoia, about group action and individual action within groups. Posner confirms this skepticism, which comes through each time we convict corporations even though, in John Coffee's words, there is "no soul to damn or body to kick," and each time we con-

201. See SLOBOGIN, supra note 58 (Supp. 1995) at 2-3 (citing Clinton Administration's gang legislation).
203. See id. § 5.03(1)(a)-(b).
205. See id. at 248-49.
206. See Ian R. Macneil, Bureaucracy, Liberalism, and Community—American Style, 79 NW. U. L. REV. 900, 918 n.65 (1984-85); see also Daniel R. Fischel & Alan O. Sykes, Corporate Crime, 25 J. LEGAL STUD. 319, 339 (1996) ("The Pinto case contributed to the widespread criticism of corporate America .... Corporations, the critics stressed, lacked accountability .... Lawless behavior, including price-fixing, illegal political contributions to domestic and foreign governments, environmental damage, and health and safety violations—was the norm rather than the exception.").
207. See POSNER, supra note 204, at 248-49.
208. John C. Coffee, "No Soul to Damn: No Body to Kick": An
vict corporate officers on the basis of strict liability, which is otherwise anathema to the criminal law. So too is corporate free speech, while "not wholly outside the protection of the First Amendment," hardly free when compared with individual expression. Quite typically, behavior that is unactionable when it occurs on the street, e.g., sexual harassment, is tortious when it occurs in the corporate setting.

Outside of corporate life, government, with the Court's approval, often forces institutional actors to give themselves over, or at least some of their rights, to the smooth functioning of the group. For instance, the Court says it is acceptable to suspend a public high school student or fire a public employee for distasteful conversations or for long hair. Just as an individual's right to be treated like an equal can trump an individual's right to associate with a group, individuals can be compelled to join groups and to finance some group expenditures. In addition, a group's right to "assemble" is narrower


212. See Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 507-08 (1969) (stating that schools could control general deportment or length of skirts but could not ban the wearing of arm bands to protest the Vietnam War).


214. See Kelley v. Johnson, 425 U.S. 238, 244 (1976) (holding that a hair-length regulation for county police officers did not constitute a "substantial claim of infringement on the individual's freedom of choice with respect to certain basic matters").


216. See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 244 (1977)
than an individual's right to speak freely, and remedies for defamation are reserved for individuals, not institutions. Again, while I know Posner thinks the law has this backwards because innovation pervades group life, my point here is that the law's comparatively low valuation of group activity is actually more firmly established than Stuntz admits. The legitimacy of a regulatory regime thus depends as much on the nature of group or institutional life as on the absence of coercion in the enforcement of such a regime.

Stuntz indicates elsewhere that he, too, thinks that looser constraints on regulatory action are symptomatic of the nature of institutional life regardless of the force used or not used by regulatory inspectors. In Implicit Bargains, Government Power, and the Fourth Amendment, Stuntz argues that the broader-than-normal search rights of regulatory inspectors are implicitly agreed to by search victims, who would rather be searched than face other, presumably worse, sanctions at regulators' disposal. For example, students may resent school officials searching their purses, but since students can be kicked out of school for almost anything, the search is preferable to all but the most lawless students. This "implicit

(Powell, J. concurring) ("[T]he Court apparently rules that public employees can be compelled by the State to pay full union dues to a union with which they disagree.").

217. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982) (recognizing that boycotts "may have a disruptive effect on local economic conditions" and thus may be subject to some forms of governmental regulation).


219. See Posner, supra note 171, at 404-05.

220. See Privacy's Problem, supra note 1, at 1057-59 (highlighting the difference between the Fourth Amendment protection against searches to solve or prevent serious crimes and the lesser protection against searches by "special needs" governmental agencies); Substantive Origins, supra note 2, at 445 (observing the adoption of a rational basis scrutiny applied to non-police searches that are not deemed "outrageous").


222. See id. at 567-75 (discussing the "implicit bargain" between receiving a governmental benefit and consenting to regulatory search).

223. See id. at 571 ("the upshot is that restricting school searches
bargain" theory holds that the greater discretionary power of officials to punish wrongdoers on little or no suspicion not only includes the lesser power to investigate them on little or no suspicion, but actually makes the wielding of the lesser power preferable to the subjects of official action.224

If Stuntz is conditioning his "implicit bargain" theory on the lack of official coercion, then he should say so. But again, even if Stuntz means to impose such a condition, it is not so clear that the Court is set against official coercion in regulatory settings.225

CONCLUSION

There is coercion in police investigation. But whether the police needlessly punching homeowners in the face is typical police behavior is a complicated empirical question. That the Court may have overlooked or even ignored this mode of police behavior in one case226 does not, however, without more, mean that coercion is underlitigated, under-regulated, or susceptible to improvement through judicial rather than administrative action. While I am not sure that the Court can do more than it already does to regulate the use of deadly and nondeadly force in police practices, I am sure that the problem of police coercion is far from demonstrated by stretching the meaning of "coercion" all out of shape. Indeed, I doubt seriously that coercion can carry the load Stuntz asks it to in instances of, for example, plain view, consent, and stalking.

I do not wish to be misunderstood: Stuntz is quite correct to insist that coercion matters. But privacy also matters, despite the bad rap it has gotten lately in the cases227 and commentary.228 In fact, so much of what the police do is both coercive

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224. See id. at 567-75.
225. See supra notes 94-110 and accompanying text.
226. See Privacy's Problem, supra note 1, at 1066-68 (discussing Anderson v. Creighton, 483 U.S. 635 (1987)).
227. See supra notes 21-34 and accompanying text.
228. See e.g., Scott E. Sundby, "Everyman"s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751, 1777-87 (1994) (dealing with problems of privacy by redescribing them as problems of trust).
and hostile to privacy that it is puzzling that Stuntz would go
to so much trouble to decouple them. When privacy and liberty
interests can be decoupled—when police act, but not coercive-
ly—privacy is still worth protecting, even in lowly cigarette
packages and paper sacks.

That targets of regulatory inspections have so little privacy
may, as Stuntz argues, have something to do with the absence
of coercion in those settings. But while regulatory inspectors
are not generally as rough as police, inspectors' broader inves-
tigatory intrusions into the regulatory world do make sense in
privacy terms because of the inherent risks that institutional
life poses to individual privacy. Unless Stuntz envisions consti-
tutional law as "a featureless plane of undifferentiated
rights,"229 which he does not, there is nothing controversial
about suggesting (or merely observing), as I do, that our rights
as individuals are more important than our rights as members
of groups.

229. See John C. Jeffries, Jr. & William J. Stuntz, Ineffective Assistance
and Procedural Default in Federal Habeas Corpus, 57 U. CHI. L. REV.