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Reply

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REPLY

*William J. Stuntz**

It is common ground in Fourth Amendment law and literature that the law should protect privacy, that its primary purpose should be to regulate what police officers can see and hear. I believe this view is mistaken, for reasons that emerge nicely when one thinks about how the privacy norm would affect the law *outside* criminal procedure. If we took seriously the things courts say in Fourth Amendment cases and tried to apply them to everything the government does (instead of applying them only to the police), we would soon find ourselves in the constitutional world of 1905. If there is something wrong with the constitutional order of the *Lochner* era, there must be something wrong with focusing the law of police investigation on privacy. It would be better if the law were to emphasize the one thing that most distinguishes the police from other government officials: the police use force, sometimes violent force, on individual citizens.

I think Professor Seidman agrees with all this.[1] We disagree mainly about how far the law has already traveled along the path from guarding privacy to regulating coercion. Even there, our disagreement is only partial: both of us note that the Fifth Amendment has largely made this shift,[2] and both of us note that the Fourth Amendment tends not to apply except in situations in which there is a coercive confrontation between a police officer and a suspect.[3] Perhaps, as Seidman suggests, these patterns show that the law does not really worry about privacy anymore. But I doubt it. The key point here is what Fourth Amendment law *does* in cases in which it applies. The Fourth Amendment regulates street stops, but it pays little attention to how coercively the police behave in those stops — instead, the law concerns itself with whether and when the police

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1. *See* Louis Michael Seidman, *The Problems with Privacy's Problem*, 93 MICH. L. REV. 1079, 1081, 1087-92 (1995).

2. *Id.* at 1082-84; William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1068-71 (1995).

3. *See* Seidman, *supra* note 1, at 1090-92; Stuntz, *supra* note 2, at 1056-57, 1071 & n.200.

can look in suspects' pockets.[4] So too, the law limits police officers' ability to enter people's houses but turns a blind eye to how violently the cops behave once inside.[5] I try to demonstrate these points in my article, and I won't rehash the examples here. Suffice it to say that the law gives the police a lot more incentive to worry about where they look than about how roughly they treat the targets of their attention. Searches are a bigger deal in Fourth Amendment law than seizures, even seizures of people. This is a consequence of courts thinking primarily about privacy, about people's ability to keep secrets, instead of about what makes the police a potential danger in a free society — the fact that they have guns and clubs and can use them.

The second half of Seidman's essay raises a different and broader point. Seidman contends that the very idea of protecting a private sphere cannot survive legal realism, for one cannot tell what is "private" without some baseline, and the realists showed that no baseline is more natural than any other. Once government power extends potentially to everything, the government can extort "consent" to anything. When the greater power is all-encompassing, and when the greater power usually includes the lesser, there is no stopping the exercise of lesser powers.[6]

Seidman may be right about all this. (Though there *are* ways of limiting lesser powers. As Seth Kreimer has shown, the law can adopt baselines other than potential government authority — for example, one might ask whether, if the lesser power were denied, the government really might exercise the greater power.[7] This amounts to asking whether the government is using its power as a bluff. The question is quite similar to what the law asks in contract duress cases, or in blackmail cases.) And if Seidman is right, I agree that his point devastates any theory of constitutional privacy protection.

But the baselines problem cannot devastate *all* constitutional regulation of the police. Even in a world in which the public-pri-

4. Thus, as I note in the article, the law requires a greater justification for ordering a suspect to empty his jacket pockets than for seizing him at gunpoint. *See* Stuntz, *supra* note 2, at 1065-66.

5. *See id.* at 1066-68.

6. *See* Seidman, *supra* note 1, at 1094-1099.

7. *See* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1371-74 (1984). For an application of this part of Kreimer's argument to some Fourth Amendment problems, see William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 567-76 (1992).

vate distinction has collapsed, the government is not free to shoot its citizens or to club them on the street. Violence is not the government's right but something to be used sparingly, and only for the right sorts of reasons. Regulating violence casts no doubt on the constitutionality of the regulatory state, because the regulatory state tends to exercise its power in less than violent ways. Thus, focusing the law of police investigation on coercion and violence does not raise the same kinds of difficulties as protecting the sanctity of briefcases and glove compartments. In particular, it does not fall prey to the kinds of realist attacks that Seidman raises in his interesting essay. We are left with the proposition that using the Fourth and Fifth Amendments to protect privacy cannot work, but using them to limit coercion and violence can. In other words, the sensible course of action — worrying about what the police can do to people rather than what they can see — is also the only course of action that doesn't collide with the rest of our constitutional order.