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RESPONSE

THE PROBLEMS WITH PRIVACY'S PROBLEM

*Louis Michael Seidman**

There is so much right about Professor Stuntz's important and provocative article¹ that it seems a shame to focus exclusively on what is wrong. So let me say at the outset that Professor Stuntz is right to be concerned about police violence. He is right when he asserts that privacy has a problem, and he is right that the problem is associated with the rejection of *Lochner v. New York*.²

In my judgment, however, Stuntz is mostly wrong about what privacy's problem is. The real problem is not about *informational* privacy, and it is both more complex and less remediable than the one he identifies.

In Part I of this response, I suggest some reasons why the problem on which Professor Stuntz focuses is less serious than he supposes. Part II sketches the real problem and some of its consequences.

I. PROFESSOR STUNTZ'S PROBLEM

Stuntz deserves credit for focusing on what too many have ignored: that constitutional criminal procedure has changed as the world view exemplified by *Lochner* has lost credibility.

For present purposes, *Lochner* stands for the proposition that natural, discoverable, and judicially enforceable boundaries separate public and private, feasant and nonfeasant, and freedom and coercion. According to this proposition, when the government affirmatively acts to invade a private sphere, it coerces individuals, and its conduct is constitutionally suspect. When the government

* Professor of Law, Georgetown University Law Center. A.B. 1968, University of Chicago; J.D. 1971, Harvard. — Ed. I am grateful to David Cole, Julie O'Sullivan, Mark Tushnet, and Silas Wasserstrom for helpful comments, provided on very short notice, on an earlier draft of this article. I owe special thanks to William Stuntz, who, in the best tradition of scholarly exchange, has tried to make my criticism of his work as good as it can be.

1. William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995).

2. 198 U.S. 45 (1905).

fails to act, individuals who do not venture into the public sphere are free, and no constitutional issue is raised by its inaction.³

The growth of the regulatory state and its constitutional validation unsettled this world view. Since 1937, the Supreme Court has largely disclaimed the task of policing a natural boundary between public and private,⁴ at least with respect to ordinary social and economic legislation.⁵ Instead, it has allowed the political branches both to treat the private sphere as constituted by a pattern of government actions and inactions and to conclude that individual freedom might best be promoted by government action rather than inaction.⁶ As a result, the judiciary has been less vigorous in defending the social and economic status quo, and has demonstrated far greater tolerance of government actions designed to redistribute wealth and power.

For reasons I will discuss in Part II, I believe that the assimilation of this post-*Lochner* learning has been less complete than is commonly supposed.⁷ For now, though, it is enough to observe that the changes that have occurred could not possibly leave criminal procedure untouched.

During the *Lochner* era, an individual's property was located within the private sphere, where it was subject to judicial protection. *Lochner*-type thinking therefore provided a firm base for an

3. For excellent discussions of the jurisprudence of *Lochner*, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 9-31 (1992); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1193-219 (1985); and Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

4. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963) ("It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition . . .'" (quoting *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536 (1949))); *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) ("[T]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

5. The Court has sporadically applied a different standard to legislation affecting family rights and procreative freedom. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 133 (1973); cf. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990) (recognizing that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment). But cf. *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) (advocating "great resistance" to expanding the scope of the Due Process Clause because "[o]therwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority").

6. Although *Lochner* has been largely abandoned as a limitation on legislative power, *Lochner*-like ideas survive as "natural" and prepolitical limits on judicial authority. See Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENTARY 379, 397-99 (1993).

7. See *infra* text accompanying notes 66-73.

interpretation of the Fourth and Fifth Amendments that protected substantive rights of property. The "mere evidence" rule, which absolutely prohibited seizures of things that were neither contraband nor the fruits or instrumentalities of crime,⁸ and the trespass requirement for searches, which assimilated the Fourth Amendment to common law property definitions,⁹ fit neatly within this framework.

The conventional view of the post-*Lochner* world is that the Court adjusted criminal procedure by substituting privacy for property as the constitutionally protected value.¹⁰ Thus, the Court jettisoned the mere evidence rule and thereby abandoned absolute, property-based protections against seizures¹¹ and replaced the property-oriented trespass test with a free-floating, "reasonable expectation of privacy" standard for searches.¹²

A great strength of Stuntz's article is its convincing demonstration that this conventional view is wrong. He is plainly correct when he asserts that informational privacy, like absolute protection for property, is inconsistent with the presuppositions of the regulatory state.¹³ Today, countless government agencies regularly demand information from citizens that would have been out of bounds under the old regime.¹⁴ Stuntz is also right when he notes

8. The rule had its origins in *Entick v. Carrington*, 19 Howell's State Trials 1029 (C.P. 1765), in which Lord Camden rejected the argument that a warrant was valid because it served as "a means of detecting offenders by discovering evidence." 19 Howell's State Trials at 1073; see also TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 52-59 (1969). The clearest American articulation of the rule is in *Gouled v. United States*, 255 U.S. 298 (1921).

9. See, e.g., *Goldman v. United States*, 316 U.S. 129 (1942); *Olmstead v. United States*, 277 U.S. 438 (1928).

10. See, e.g., Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 967-71 (1977). This view finds some support in Justice Stewart's notoriously cryptic but nonetheless generative effort to reorient Fourth Amendment law in *Katz v. United States*, 389 U.S. 347 (1967):

[The] Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

389 U.S. at 351-52 (citation omitted).

11. See *Warden v. Hayden*, 387 U.S. 294 (1967).

12. The test originated in Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347, 360 (1967). The Court endorsed the test in *Smith v. Maryland*, 442 U.S. 735, 739-41 (1979).

13. See, Stuntz, *supra* note 1, at 1029-34, 1052-54.

14. The Court has been quite hostile to claims that the mere provision of information to the government violates constitutionally protected rights of privacy. See, e.g., *Whalen v. Roe*, 429 U.S. 589 (1977). It has been more sympathetic when provision of the information might chill the exercise of an independent constitutional right. See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958) (free speech rights).

the connection between these procedural changes and the expanding scope of the government's substantive powers.¹⁵

Where Stuntz has gone astray, I think, is in failing to recognize other ways in which the law of criminal procedure has adjusted to the change in legal regimes. The adjustment is most obvious with respect to Fifth Amendment law. As Stuntz himself acknowledges,¹⁶ the central focus of modern self-incrimination cases is not informational privacy. Although privacy of a sort may be a necessary condition for Fifth Amendment protection, it is no longer a sufficient condition. Moreover, even when privacy is required, it is not the kind of informational privacy Stuntz envisions.

Thus, the Court has repeatedly held that the Fifth Amendment shields defendants "from producing . . . [incriminating] evidence but not from its production."¹⁷ When the government searches a house, wiretaps a conversation, seizes or subpoenas private papers, or takes blood samples, it clearly invades informational privacy. Yet these activities raise no Fifth Amendment issue.¹⁸

The modern Fifth Amendment is about individual will and freedom of thought, not informational privacy.¹⁹ Its main focus is not on keeping things secret but on assuring that the defendant is not forced to cooperate in the discovery of evidence that inculpatates him.

Under modern Fifth Amendment doctrine, the government may secure incriminating information against a defendant's will, but it may not *use* her will to serve its ends. For example, the government may forcibly subject a drunk-driving suspect to a blood test because

15. See Stuntz, *supra* note 1, at 1030-31, 1050-52.

16. See *id.* at 1024.

17. *Johnson v. United States*, 228 U.S. 457, 458 (1913) (Holmes, J.). For applications of this holding, see, for example, *Andresen v. Maryland*, 427 U.S. 463, 473 (1976); *Fisher v. United States*, 425 U.S. 391, 398-99 (1976); and *Couch v. United States*, 409 U.S. 322, 328 (1973).

18. See *Andresen v. Maryland*, 427 U.S. 463 (1976) (holding no Fifth Amendment violation occurred during a search of an office and a seizure of private papers); *Fisher v. United States*, 425 U.S. 391 (1976) (holding that a subpoena of private papers is constitutional); *Fisher*, 425 U.S. at 407-08 (stating that the wiretapping of conversations raises no Fifth Amendment issue); *Schmerber v. California*, 384 U.S. 757 (1966) (holding that no Fifth Amendment violation occurred when a blood sample was admitted into evidence).

19. The Court succinctly summarized its position in *Fisher*:

We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy — a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against "compelled self incrimination, not [the disclosure of] private information."

425 U.S. at 401 (alteration in original) (quoting *United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975)).

this is something that can be done against the defendant's will.²⁰ The government may not force the same defendant to state the date of her sixth birthday because such a statement can be achieved only through the exercise of will.²¹

True, this prohibition on the commandeering of an individual's will is not absolute. The government is permitted to use a person's will in circumstances in which the evidence thereby obtained does not provide incriminating information about an individual's internal thoughts, desires, and beliefs.²² Consider compelled handwriting exemplars, for example. Blood can be taken against a suspect's will, but providing a handwriting exemplar requires an exercise of will. Still, compelled handwriting exemplars do not violate the Fifth Amendment because they are thought to reveal nothing about the defendant's internal mental state.²³ Similarly, immunized testimony can be compelled even when it does provide internal information because this information is, by hypothesis, not incriminating.²⁴

There is therefore a sense in which Fifth Amendment law relates to the sort of information that the government obtains by compulsion. It does not follow, however, that the Fifth Amendment is concerned with informational privacy in the sense that Stuntz uses the term. Fifth Amendment protection does not attach simply because a person is compelled to provide information the government otherwise would not have learned. The government can compel a defendant to provide it with such information — for example, the shape of his handwriting or the sound of his voice — so long as the information is not “internal” in the sense described above. Moreover, the government can secure even “internal” in-

20. *Schmerber*, 384 U.S. at 764 (noting that the privilege prohibits compulsion of “communication” or “testimony” but not compulsion that makes suspect the source of “real or physical evidence”).

21. See *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (holding that compelling a suspect to answer a question concerning the date of his sixth birthday violates the privilege because the inference concerning mental confusion was drawn from this testimonial act rather than from physical evidence).

22. See, e.g., *Doe v. United States*, 487 U.S. 201, 210 n.9 (1988) (holding that evidence is testimonial for Fifth Amendment purposes if it is expressive of the content of an individual's mind); *Curcio v. United States*, 354 U.S. 118, 128 (1957) (same).

23. See *Gilbert v. California*, 388 U.S. 263, 266-67 (1967); see also *United States v. Dionisio*, 410 U.S. 1, 7 (1973) (holding that a compelled voice exemplar does not violate the Fifth Amendment); *United States v. Wade*, 388 U.S. 218, 221-22 (1967) (holding that compelling a defendant to stand in a lineup does not violate the Fifth Amendment); *Holt v. United States*, 218 U.S. 245, 252-53 (1910) (holding that compelling a defendant to wear an article of clothing does not violate the Fifth Amendment).

24. See *Kastigar v. United States*, 406 U.S. 441 (1972) (holding that use- and derivative-use immunity are sufficient to make compelled statements constitutional).

formation — for example, by seizing or subpoenaing a defendant's diary — so long as it does not do so in a way that commandeers his will.²⁵

If I read him correctly, Stuntz understands all this.²⁶ The mystery, then, is what, precisely, he thinks the problem with modern Fifth Amendment law is. He is right to suppose that there is a problem, and I explore its nature in Part II of this response. For now, it is enough to note that, whatever its nature, the problem is not *informational privacy*.

The story with respect to the Fourth Amendment is more complex. It is true that the modern Court talks about Fourth Amendment doctrine in terms of informational privacy.²⁷ Viewed superficially, this focus is in tension with the Court's abandonment of substantive limits on government regulation and with its readiness to permit the government to learn all sorts of facts about our private lives in order to implement a regulatory regime.

Once again, however, Stuntz fails to take adequate account of how Fourth Amendment law has changed in order to accommodate itself to the new constitutional ideology. When one focuses on these changes, two problems with Stuntz's problem emerge.

First, Stuntz exaggerates the tension between the supposedly strict Fourth Amendment regime and the supposedly loose regulatory regime. On the one hand, the Court has never quite retreated to the position that there is *no* judicial review of regulatory legislation. Instead, it has insisted that such laws have a "rational basis" and survive some form of low-level or minimal scrutiny.²⁸ On the

25. Of course, the act of producing subpoenaed papers does require an exercise of will. The act of production, however, does not normally trigger Fifth Amendment protection because mere production is usually not incriminating testimony. See *Fisher v. United States*, 425 U.S. 391 (1976); cf. *United States v. Doe*, 465 U.S. 605 (1984) (holding that an act of production does trigger protection when it is testimonial). Although the subpoenaed papers themselves may be incriminating, they are unprotected because their creation is ordinarily not compelled. See *Fisher*, 425 U.S. at 409-10. Ironically, even if the creation of the papers is compelled, they may still be unprotected for the very reason that the government requires their creation. See, e.g., *Shapiro v. United States*, 335 U.S. 1 (1948) (announcing a required records exception to the Fifth Amendment). For a discussion of this case, see *infra* text accompanying notes 96-98.

26. See Stuntz, *supra* note 1, at 1059-60.

27. See *Katz v. United States*, 389 U.S. 347, 350-52 (1967). Compare this view with Justice Black's dissent:

While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the crucial place to look in construing a written document such as our Constitution.
389 U.S. at 365 (Black, J., dissenting).

28. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 (1981) (defining the issue as whether the legislation is "rationally related to achievement of the statutory

other hand, the modern Court has not read the Fourth Amendment as providing absolute protection against searches.²⁹ In general, searches are permitted so long as they are supported by some quantum of evidence — either probable cause³⁰ or reasonable suspicion³¹ depending upon the context.

In recent years, the gap between these two standards has narrowed. On occasion, the Court's minimal scrutiny of social and economic legislation has had "bite" that has led to invalidation.³² More significantly, the Court has largely retreated from the task of reviewing probable cause and reasonable suspicion determinations. Instead of turning these standards into fixed and rigid requirements, it has treated them as a "practical, nontechnical conception"³³ that is "not readily, or even usefully, reduced to a neat set of legal rules."³⁴ The Court has insisted that the expertise of the officer at the scene be considered³⁵ and that he not be shackled by

purposes"); *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) (holding that legislation should be upheld if the legislative measure is a "rational way to correct" the evil at hand for correction); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (assuming that "a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis").

29. *See Warden v. Hayden*, 387 U.S. 294, 300-01 (1967) (overruling the "mere evidence" rule, which had absolutely prohibited searches for certain items).

30. *See, e.g., Illinois v. Gates*, 462 U.S. 213 (1983) (holding that a search for evidence was justified on probable cause grounds); *Andresen v. Maryland*, 427 U.S. 463 (1976) (same).

31. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that searches of students by teachers are permitted on reasonable suspicion).

32. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (invalidating a zoning ordinance prohibiting a group home for the mentally retarded under rational basis review); *United States Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973) (invalidating restrictions on food stamp eligibility under rational basis review). For the classic discussion, see Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

33. *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

34. *Illinois v. Gates*, 462 U.S. at 232.

35. *See, e.g., United States v. Ortiz*, 422 U.S. 891, 897 (1975) (noting that in deciding whether there is probable cause officers "are entitled to draw reasonable inferences . . . in light of their knowledge of the area and their prior experience"); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (noting that in determining whether an officer acted reasonably "due weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience").

post hoc judicial second guessing.³⁶ All of this comes close to articulating what amounts to rational basis review.³⁷

Perhaps some daylight nevertheless remains between the reformulated rational basis test and the reformulated probable cause and reasonable suspicion standards. It is here, however, that the second problem with Stuntz's problem takes hold. The simple fact is that modern Fourth Amendment law has mostly assimilated the collapse of protection for informational privacy *per se*. Stuntz points out that in the regulatory context, the government is allowed to insist upon any information it finds useful in pursuit of its goals.³⁸ He fails to recognize that the modern Fourth Amendment usually provides no greater protection.

Modern Fourth Amendment law assumes that the government is entitled to seize any item that is useful in any way to a criminal investigation.³⁹ True, the police must have probable cause to believe that they *are* seizing such an item.⁴⁰ But so long as they seize what they claim to want, there are essentially *no* judicially imposed restrictions on what they can want.⁴¹

Modern Fourth Amendment law focuses on what might be called the "collateral damage" imposed by searches and seizures rather than on informational privacy. So long as a government

36. For example, the Court has held that warrant applications drafted by police officers must reflect "nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings." *Illinois v. Gates*, 462 U.S. 213, 235-36 (1983); *see also* *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (describing probable cause as based on "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act").

37. *Cf. Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) (holding that probable cause "does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt").

38. Stuntz, *supra* note 1, at 1055.

39. *See, e.g., Andresen v. Maryland*, 427 U.S. 463, 482-84 (1976) (holding that a seizure is justified if the item seized is relevant to the crime under investigation); *Warden v. Hayden*, 387 U.S. 294, 307 (1967) (holding that a seizure is justified if a nexus exists "between the item to be seized and criminal behavior" or if "the evidence sought will aid in . . . apprehension or conviction").

40. *See, e.g., Texas v. Brown*, 460 U.S. 730, 741-44 (1983) (plurality opinion) (holding that probable cause is required for seizure).

41. This statement requires a minor qualification. In addition to its more specific commands, the Fourth Amendment contains a general reasonableness requirement. Hence, wholesale or extremely burdensome seizures might violate the Fourth Amendment in circumstances in which the damage to the individual clearly outweighs the value of the seizure to law enforcement. But precisely the same restriction applies in the regulatory context. *Compare* *Oklahoma Press Publishing v. Walling*, 327 U.S. 186, 208 (1946) (holding that in a regulatory setting the "gist of the protection is . . . that the disclosure sought shall not be unreasonable") *with* *Winston v. Lee*, 470 U.S. 753, 763-67 (1985) (finding a search unreasonable despite the presence of probable cause).

seizure imposes no such damage, it is constitutional regardless of its costs to informational privacy.⁴² Only in cases in which collateral damage is imposed must police demonstrate to a magistrate that the damage is cost-justified.

Before summarizing the case law that supports these propositions, it may be useful to say something about what this collateral damage typically involves. One thing it might involve is an invasion of informational privacy. If the police search my house for drugs, generally it will not be possible to do so by means of a surgical strike. In the course of looking for the drugs, they are likely to see many other things — personal possessions, private papers, and so on — that will tell them something about me.

Stuntz correctly points out that many searches regulated by modern Fourth Amendment law seem to impose little risk to informational privacy of this sort. Police frisks on the street, examinations of the bottom of stereos, or searches of cars, paper bags, and cigarette packages often reveal little information about an individual.⁴³ He is also correct when he notes that it is anomalous to be concerned about the collateral damage to informational privacy when there is so little concern about direct assaults upon this value.⁴⁴

What Stuntz fails to realize is that these supposed anomalies exist precisely because the primary focus of the collateral damage requirement is *not* informational privacy. What, then, is the focus?

Oddly, the focus is precisely where Stuntz says it should be: on violence, disruption, and humiliation. Consider, first, the search of a house. I share Stuntz's concern that the Fourth Amendment does too little to regulate illegitimate police violence in cases like *Anderson v. Creighton*⁴⁵ when there is probable cause to justify entry into a house. What he fails to recognize, however, is that even legitimate police house searches necessarily entail considerable violence and disruption and that Fourth Amendment protections attach precisely because of this collateral damage imposed by legitimate police activity.

42. *But cf. supra* note 41.

43. *See* Stuntz, *supra* note 1, at 1019.

44. *See id.* at 1054-60.

45. 483 U.S. 635 (1987).

For example, police officers acting entirely lawfully and reasonably may use force to gain entry into a house.⁴⁶ If the occupant is not at home, or does not respond quickly enough, they may break down his door or do other damage to the structure to gain entry.⁴⁷ If he is at home, they may rouse him from his bed in the middle of the night.⁴⁸ Obviously, police raids can be a terrifying experience for all involved, and the slightest miscalculation can result in serious injury or death.⁴⁹

I suppose there is a sense in which the police gain "information" when they see the suspect unguarded, perhaps naked or in pajamas, and surely not ready to receive guests. But this characterization wildly distorts what is really at stake. The real injury is not the revelation of information but the invasion of broader, more amorphous, but no less real, dignity interests.

Nor is that the end of the matter. As the search proceeds, the police not only find out things. They also tear apart things. Victims of searches are likely to find their personal papers scattered about the house, their upholstery torn, their possessions in shambles.⁵⁰

It bears emphasis that this sort of damage is not something that modern Fourth Amendment jurisprudence ignores, as Stuntz would have us believe. On the contrary, it is precisely this damage — en-

46.

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109 (1988). See generally 2 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.8(b) (1987). The Supreme Court has not definitively settled whether the Constitution requires the police to give notice before using physical force. See *Wilson v. Arkansas*, 317 Ark. 548 (1994), cert. granted, 115 S. Ct. 571 (1994) (granting certiorari to determine whether the "knock and announce" rule is constitutionally required); cf. *Ker v. California*, 374 U.S. 23 (1963) (plurality opinion) (finding that in the presence of exigent circumstances, a failure to give notice does not violate the Constitution).

47. See *supra* note 46.

48. See *Gooding v. United States*, 416 U.S. 430, 458 (1974) (holding that no special showing is required to justify a nighttime search).

49. For a tragic recent example, see Brian McGrory and Toni Locy, *Minister Dies after Botched Drug Raid*, BOSTON GLOBE, Mar. 26, 1994, at 1 ("A Boston Police SWAT team on a daylight drug raid in Dorchester rammed through the door of the wrong apartment yesterday and handcuffed a frail, retired Methodist minister, who collapsed from a heart attack and died, according to officials.").

50. Ironically, as the search proceeds, the more likely the defendant is innocent, the greater this damage will be. If the police quickly find what they are looking for, the search will end; damage is most extensive when police must go through everything before concluding that what they are looking for simply is not there. See, e.g., *Melear v. Spears*, 862 F.2d 1177, 1181 (5th Cir. 1989) (describing a police search that involved breaking down doors and breaking glass); DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 352-54 (1991) (detailing a police search that destroyed a room).

tailed in perfectly legitimate police searches — that triggers Fourth Amendment protection.

Stuntz may well be right that Fourth Amendment protection should go beyond this point.⁵¹ Perhaps we should impose more stringent limitations on police violence even when there is probable cause and a warrant to justify the initial entry.⁵² He overlooks the fact that the probable cause and warrant requirements exist in part to prevent the prospect of the violence and disruption inherent in searches unless a magistrate is satisfied that the violence and disruption are cost-justified. Because of the risk of this damage, and not because of violations of informational privacy, Fourth Amendment law requires a warrant and probable cause before the process begins.

Other types of searches do not impose this sort of collateral damage, but thinking of them in terms of information seriously mischaracterizes their costs. Consider searches on the street, for example. We must not lose sight of the fact that these searches also amount to a species of violence. A typical search requires the police to delay a suspect who is going about his business, force him to assume a vulnerable and uncomfortable position, embarrass him before others, and touch all parts of his body.⁵³ Even if the search is less intrusive — for example, opening a paper bag or requiring a defendant to get out of his car — it may well be a terrifying experience. No matter how scrupulously the officer limits the scope of the search, the suspect may have no way of knowing these limits while the search is progressing. Members of minority communities in particular may have reason to fear that things will spin out of control.

Instead of dealing with these very real situations, Stuntz asks us to imagine a hypothetical officer who politely requests a suspect to empty his pockets. Why, he asks, should a Fourth Amendment not obsessed with informational privacy speak to this situation?⁵⁴

51. See Stuntz, *supra* note 1, at 1066-68.

52. Cf. *Tennessee v. Garner*, 471 U.S. 1 (1985) (holding that the Fourth Amendment restricts the use of deadly force to effect an arrest even when there is probable cause).

53. Stuntz is correct when he observes, "The most important aspect of . . . street stop[s] to an innocent suspect must be some combination of the stigmatizing nature of the encounter and the police officer's use of force." Stuntz, *supra* note 1, at 1065. It is precisely because street stops typically require this use of force that the Fourth Amendment regulates them.

54. See *id.* at 1066.

Of course, if the suspect voluntarily acquiesces to the request, the Fourth Amendment does not speak to it.⁵⁵ To say that the suspect does not voluntarily acquiesce is to say that he submits because of the fear of legalized violence. The suspect empties his pockets only because he knows that if he does not, the officer is authorized to use force to empty them for him. The Fourth Amendment regulates the officer's ability to threaten this force, not because of its concern with informational privacy, but because threats of violence are, themselves, a form of violence.

Wiretaps, visual surveillance, searches of parked cars, and the like are not violent or invasive in this sense. Once again, however, it distorts analysis to analogize the damage that they do to the damage to informational privacy that occurs when an individual fills out a tax form. The key difference is that these police investigative techniques typically catch people unaware. Because they reveal things about people in circumstances in which they do not know that they are being spied upon, these techniques violate human dignity. It is one thing to fill out a form that requests information about even the most personal details of one's life. It is quite another to discover after the fact that someone has been observing these personal details firsthand with a telescope aimed at one's bedroom window.

Understanding these differences throws Stuntz's representation reenforcement argument into quite a different light. Stuntz claims that representation reenforcement does not support current Fourth Amendment doctrine because unrepresented minorities victimized by police searches actually receive *more* protection than middle-class persons who claim tax deductions or secure business licenses.⁵⁶ But this claim is true only if one insists on limiting the costs of police activity to informational privacy. Of course, the costs are not so limited, and no middle-class individuals filling out tax forms are subject to the threatened and real violence, the humiliation, disruption, and embarrassment inherent in much police activity.

Moreover, the crucial fact is that when these collateral costs are not imposed — when the cost of police activity is solely to informational privacy — modern Fourth Amendment doctrine usually does not provide protection.

Consider first the plain view doctrine. In essence, this doctrine provides that police officers need not have advance judicial ap-

55. See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (upholding consensual search without warrant or probable cause).

56. See Stuntz, *supra* note 1, at 1044-47.

proval when they seize an item without imposing the sort of collateral damage described above. If the police are already legitimately where they need to be to effectuate the seizure and are already permitted to use the force they need to use, then the seizure is permissible.⁵⁷

Cases defining what constitutes a search for Fourth Amendment purposes stand for a similar proposition. In general, police activity does not count as a search unless it imposes the sort of collateral damage described above. Consider, for example, the case of dog sniffs of closed containers. Unlike typical police activity, these searches really are surgical strikes. The dog reveals the presence of illegal drugs and nothing else. Precisely because the search imposes no collateral damage, the Court has treated it as outside the scope of the Fourth Amendment.⁵⁸

It is especially instructive to compare dog sniffs with urine testing for drugs. Viewed from the perspective of informational privacy, the two techniques are identical. So long as the testing is confined to illicit drugs,⁵⁹ both techniques reveal only the presence of an illegal substance without providing any additional information to investigators. Yet the Court has treated urine testing as a search regulated by the Fourth Amendment⁶⁰ because, in our culture,

57. For example, in *Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993), an officer conducting a legal frisk for weapons felt a lump no bigger than a marble. The Court held that the resulting seizure of crack cocaine would have been constitutional if this "plain touch" had given rise to probable cause to believe that the defendant possessed seizable evidence, because the defendant would not have suffered any invasion beyond the legitimate invasion inherent in the frisk. 113 S. Ct. at 2137-38. Because the officer subjected the defendant to the additional indignity of "squeezing, sliding and otherwise manipulating the contents of [his] pocket," the search was unlawful. 113 S. Ct. at 2138-39 (quoting *Minnesota v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992)); see also *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971) ("What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused."). The Court discarded the "inadvertence" requirement in *Horton v. California*, 496 U.S. 128 (1990).

58. See *United States v. Place*, 462 U.S. 696 (1983); see also *United States v. Jacobsen*, 466 U.S. 109, 123 (1984) ("A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy.").

To be sure, these Fourth Amendment cases rest in part on the absence of collateral damage to interests in informational privacy. The important point is that the Court is inclined not to treat as searches police invasions that do not impose collateral damage of some sort.

59. In the course of holding that urine testing constitutes a Fourth Amendment search, the Court did note that such testing might reveal other "private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic." *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617 (1989). But it is hard to see why the possibility that other sorts of tests might reveal these facts should be relevant if the tests actually performed reveal no more than illicit drug use.

60. See 489 U.S. at 616-18.

urine testing imposes collateral damage to interests in human dignity.⁶¹

Other cases in the Court's concededly confused jurisprudence concerning the constitutional definition of searches follow a similar pattern. For example, the Court has held that police examination of open fields⁶² and of curbside garbage⁶³ are not searches for constitutional purposes. There can be no doubt that this sort of police activity reveals information. What it does not do is subject the defendant to violence, disruption, or humiliation. Finally, consider the Court's treatment of cases involving subpoenas. Subpoenas amount to self-searches. They involve no violence, no disruption, no public humiliation or embarrassment.⁶⁴ Like the required completion of tax returns, subpoenas invade informational privacy but impose no collateral damage. For precisely this reason, the Court treats them no differently from tax returns. So long as the subpoena is "reasonable" and not unduly burdensome, a defendant has no Fourth Amendment right not to comply.⁶⁵

The upshot is that modern Fourth Amendment law is mostly consistent with the post-*Lochner* validation of the regulatory state. When police only invade informational privacy, they are no more subject to judicial interference than modern regulators. The Fourth Amendment has bite only when police efforts impose collateral damage of a sort not typically imposed by regulatory intervention.

So what's the problem?

II. THE REAL PROBLEM

There is a problem, and it is serious. Indeed, it is far more serious than Stuntz imagines. The problem, however, is not about informational privacy. It is about the status of individual rights in general — about privacy broadly conceived — in a post-*Lochner* world.

61. The Court quoted with approval the following language from a lower court decision: There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

489 U.S. at 617 (quoting *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (1987), *remanded on other grounds*, 489 U.S. 656 (1989)).

62. See, e.g., *Oliver v. United States*, 466 U.S. 170 (1984).

63. See *California v. Greenwood*, 486 U.S. 35 (1988).

64. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 573 (1978) (Stewart, J., dissenting) (observing that "a subpoena would permit the newspaper itself to produce only the specific documents requested").

65. See, e.g., *Oklahoma Press Publishing v. Walling*, 327 U.S. 186 (1946).

To see the nature of the problem, consider the following not very hypothetical⁶⁶ hypothetical: A public housing project is completely inundated by drugs and violent crime. By a large majority, terrified residents vote to allow the police to conduct random searches of apartments for weapons and drugs, and police respond by conducting such searches.

What are we to make of this situation in a post-*Lochner* world? Recall that the revolt against *Lochner* was, among other things, a revolt against the distinctions between feasant and nonfeasant, and public and private. If we are to take the anti-*Lochner* position seriously, it turns standard Fourth Amendment doctrine on its head. The most serious threat to the "persons, houses, papers, and effects" of housing project residents comes not from public sources, the police, but from private sources, the criminals. If the residents are to be made "secure" from these "unreasonable searches and seizures," what is required is not government *inaction* but government *action*.⁶⁷ It follows that it is the *failure* of police to conduct searches and seizures that is constitutionally problematic. The Constitution might even be read to *require* searches conducted on less than probable cause.

Of course, no court would accept such an argument — at least not yet.⁶⁸ The fact that no court would accept it demonstrates our continuing ambivalence about the overthrow of the *Lochner* ideology. This ambivalence is rooted in the inchoate but well-grounded fear that jettisoning *Lochner* altogether would let go of the very idea of individual rights and limited government.

Yet if we cannot quite let go of *Lochner*, neither can we embrace it. Suppose we add the following twist to the hypothetical: In response to community pressure, housing officials add a term to each lease requiring that occupants "consent" to searches of their premises.⁶⁹ Armed with this consent, police conduct random searches.

66. See *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792 (N.D. Ill. 1994).

67. See Vincent Lane, *Public Housing Sweep Stakes: My Battle with the ACLU*, 69 *HERITAGE FOUND. POLY. REV.* Summer 1994, at 68 (providing a defense of sweeps for weapons from the perspective of the Chairman of the Chicago Housing Authority).

68. See *Pratt*, 848 F. Supp. at 797 (preliminarily enjoining police sweeps of public housing apartments for weapons); cf. *McKenna v. Peekskill Hous. Auth.*, 647 F.2d 332 (2d Cir. 1981) (holding that a public housing requirement that houseguests register with management violates fundamental rights of association and privacy).

69. Cf. Gwen Ifill, *Clinton Asks Help on Police Sweeps in Public Housing*, *N.Y. TIMES*, Apr. 17, 1994, at A1 (reporting that the Administration urged housing officials to ask tenants for standing consent for searches).

The outcome of this case is far less obvious.⁷⁰ Perhaps the Court would say that the government has "coerced" consent by withholding housing or that it has "unconstitutionally conditioned" access to such housing.⁷¹ Yet it might also say that the government has done no more than "offer" a gratuitous benefit — public housing — which no one need accept, and that housing residents are made no worse off when the benefit is conditioned on giving up what would otherwise be Fourth Amendment rights.⁷²

This confusion, too, results from our ambivalence about *Lochner* and the growth of the regulatory state. In a world with a natural division between public and private spheres, it was possible to imagine individuals making choices within the private sphere that were unconstrained by government. But post-*Lochner* constitutionalism permits the government to shift the baseline by subsidizing a wide range of activities — for example, housing. Of course, the ability to subsidize entails the ability to withdraw the subsidy. Hence, private decisions are always made against the backdrop of a network of governmentally imposed incentives that can be characterized as either offers or threats depending upon whether one wants the decision to appear free or coerced.⁷³

Significantly, the administrative search and the special need cases that Stuntz emphasizes are all caught in this netherland between a post-*Lochner* regulatory state and the pre-*Lochner* world

70. Compare *Piazzola v. Watkins*, 442 F.2d 284, 289 (5th Cir. 1971) (holding that the state may not "require a student to waive his protection from unreasonable searches and seizures as a condition to his occupancy of a college dormitory room") with *United States v. Doran*, 482 F.2d 929, 932 (9th Cir. 1973) (finding the implication of consent "unavoidable" in a case in which the defendant brought luggage on board an aircraft when signs and public address warnings announced that all passengers were subject to search).

71. Cf. *Nollan v. California Coastal Comm.*, 483 U.S. 825, 837 (1987) (holding that the Commission's conditioning a building permit on the transfer of an easement to the public was invalid as "an out-and-out plan of extortion" (citation omitted)).

72. Cf. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (holding that to condition a grant of federal funds to family planning clinics on their agreement not to provide counseling concerning abortion is acceptable because "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right" (quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983))).

73. In recent years, some of our best constitutional scholars have turned their attention to the conditional offer problem. For some of the most sophisticated efforts to find a solution, see RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* (1993); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); and Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 SAN DIEGO L. REV. 337 (1989). An evaluation of these efforts is well beyond the scope of this response. For an argument that the efforts are bound to fail and that this failure challenges the coherence of constitutional argument in general, see LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF: CONSTITUTIONAL DISCOURSE IN THE AGE OF CYNICISM* ch. 4 (forthcoming 1995) (manuscript on file with author).

of private spheres and individual rights. Consider, for example, *New York v. Burger*.⁷⁴ The Court held that because the junkyard industry is heavily regulated, the police may dispense with the usual requirements of a warrant and probable cause before conducting an "administrative" search.

On its face, this holding seems puzzling: Why should regulation of some constitutionally unprotected aspects of Burger's business justify regulation of other constitutionally protected aspects? The Court responded to this puzzle by relying in part on a version of consent: "When a dealer chooses to engage in this pervasively regulated business and to accept a [government] license, he does so with the knowledge that his business records . . . will be subject to effective inspection."⁷⁵ Because the government was not required to allow Burger to deal in junk in the first place, he can hardly complain when it couples its permission with a requirement that he consent to searches.

Under the *Lochner* regime, this explanation made some sense. *Lochner* presupposed a natural and judicially discoverable line between public and private. The government was allowed to control businesses affected with the public interest precisely because they were public.⁷⁶ In contrast, the right to engage in "ordinary" business was not created by the state. It was natural and prepolitical, and the state was therefore prohibited from conditioning its exercise.⁷⁷

In the post-*Lochner* world, this distinction is no longer viable.⁷⁸ Because the distinction between public and private is constructed rather than natural, the government's right to regulate extends to virtually any business. As the *Burger* dissent effectively demon-

74. 482 U.S. 691 (1987).

75. 482 U.S. at 701 (quoting *United States v. Biswell*, 406 U.S. 311, 316 (1972)).

76. See, e.g., *Munn v. Illinois*, 94 U.S. 113 (1877) (holding that a system of fixed maximum charges for grain-storage warehouses did not violate due process because the private property's use implicated a public interest).

77. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (invalidating law prohibiting a person from manufacturing ice without state permission because the business was not charged with public use).

78.

It is clear that there is no closed class or category of businesses affected with a public interest. . . . The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest," and "clothed with a public use," have been brought forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test.

Nebbia v. New York, 291 U.S. 502, 536 (1934).

strates,⁷⁹ the regulation of the junk business was no greater than the real or potential regulation of virtually any activity in New York. Thus, Stuntz is right when he notes⁸⁰ that the logic of *Burger* can be extended to automobiles⁸¹ or, indeed, to almost anything else. After all, there is no constitutional right to sidewalks; in principle, walking on sidewalks could be treated as a highly regulated activity.

Of course, the Court has not so extended *Burger*. But neither has it explained why it has not. *That*, in a nutshell, is privacy's problem.

Many — although not all⁸² — of the special needs cases reflect a similar dilemma. No one has a constitutional right to work at a railroad,⁸³ to receive welfare,⁸⁴ or to be put on probation after being convicted of an offense.⁸⁵ People who engage in these activities have therefore "consented" to searches designed to regulate them. Yet there is also, of course, a sense in which these people have not consented at all. They have merely succumbed to pressure exerted through the withholding of vital benefits. In the post-*Lochner* world, there is no way in principle to decide the category in which such cases should be placed.

As bad as all of this is, it is with regard to Fifth Amendment jurisprudence that the rejection of *Lochner* has been most destabilizing. There is a sense in which consent is ancillary to Fourth Amendment doctrine. Although consent "waives" Fourth Amendment protection, the protection itself consists of the right to avoid the sort of collateral damage described above. In contrast, the Fifth Amendment at its core is about individual choice. As argued above,⁸⁶ its central prohibition is against the harnessing of individ-

79. *New York v. Burger*, 482 U.S. 691, 720-22 (1987) (Brennan, J., dissenting).

80. Stuntz, *supra* note 1, at 1040-41.

81. Indeed, in modified form, it has been. The Court's shifting rationale for the exception to the warrant clause for automobiles has occasionally focused on their heavy regulation by the government. See, e.g., *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977).

82. The Court's treatment of school searches seems to be *sui generis* and not easily explained on an implied consent theory. See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (relying on the need to maintain an environment in which learning can take place to hold that the legality of school searches requires reasonableness, not probable cause).

83. See *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (allowing drug testing of railway workers); see also *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (allowing drug testing of Customs Service workers); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (allowing for some office searches of government workers).

84. See *Wyman v. James*, 400 U.S. 309 (1971) (upholding law allowing warrantless home visits by welfare caseworkers).

85. See *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (upholding regulation that allowed for a warrantless search of probationers' homes).

86. See *supra* text accompanying notes 19-25.

ual will for government ends. If the rejection of *Lochner* makes that concept incoherent, we are in deep trouble indeed.

To see the trouble it makes, consider *Lefkowitz v. Turley*.⁸⁷ Under New York law, individuals who contracted with the state were required to testify at judicial proceedings concerning such contracts. If they refused, existing contracts could be cancelled and future contracts denied for five years. When appellees refused to so testify because the testimony might incriminate them, they were threatened with the cancellation of their contracts. The Supreme Court held that this threat violated their Fifth Amendment rights.⁸⁸

There is a sense in which this decision is surely right. The threat of loss of employment made appellees worse off if they failed to testify than they would have been if they had testified. This difference in treatment influenced their decision in the same way that a contempt citation for failure to testify would have. Their choice was therefore not "free," and the pressure violated the privilege.⁸⁹

Matters are complicated, however, when we compare *Lefkowitz* to *United States v. Rylander*.⁹⁰ In *Rylander*, the defendant was served with a subpoena that demanded certain books and records.⁹¹

87. 414 U.S. 70 (1973).

88. 414 U.S. at 85.

89. The Court was correct in holding that nothing turned on whether the cancellation of contracts was itself a criminal penalty. The Self-Incrimination Clause guarantees an individual's right not to be compelled to be a witness against himself in a criminal prosecution. It follows that every valid Fifth Amendment claim requires the presence of two elements: compulsion and incrimination — that is, use of compelled testimony against the defendant in a criminal prosecution. In *Lefkowitz*, the contractual cancellations were relevant, not because they were criminal in nature, but because they provided compulsion. The incrimination element was satisfied because there was a risk that the statements thereby compelled might have been used in a future criminal prosecution against the individual making them.

It follows that if the government eliminates the risk of incrimination by granting immunity, compulsion is then constitutionally permissible. See *Kastigar v. United States*, 406 U.S. 441 (1972). This analysis leads to a paradox. In an earlier decision, *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Court reversed the criminal conviction of a police officer because the State had introduced against him statements made after he was threatened with the loss of his job if he did not respond. In effect, the Court held that the defendant was entitled to de facto use immunity: because the statements were compelled, the Fifth Amendment privilege would be violated if they were also incriminating. They therefore could not be used in the criminal prosecution.

The upshot of *Garrity* is that if the *Lefkowitz* contractor had testified, he too would have been entitled to de facto use immunity. Because his statements would therefore not have been incriminating, it is unclear precisely why they could not be compelled.

In *United States v. Doe*, 465 U.S. 605 (1984), the Court attempted to resolve this paradox by holding that the government could not rely upon de facto use immunity to justify compulsion. Instead, the government could compel testimony only if it formally granted immunity. The decision rests on the dubious theory that the rule is necessary to protect the government from ill-considered or inadvertent grants of immunity.

90. 460 U.S. 752 (1983).

91. 460 U.S. at 754.

Rylander responded by testifying that he did not have the documents and, on Fifth Amendment grounds, stoutly refusing to answer any questions concerning what had become of them.⁹² The Supreme Court rejected application of the privilege in this context. It held that once the papers were subpoenaed, the defendant had the responsibility to explain nonproduction.⁹³ Although the Fifth Amendment was available as a shield to ward off burdens imposed by the government, it could not be used as a sword to meet the defendant's own burden.⁹⁴

Although it may not be immediately apparent, *Rylander* rests on unconstitutional condition analysis. Rylander had a right to remain silent, but, having failed to produce the requested documents, he had no right to remain out of prison. The government may therefore condition his right to remain out of prison on his willingness to explain what had happened to the documents.

It should be readily apparent, however, that this holding transforms *Lefkowitz* into a mere drafting problem. The *Lefkowitz* contractor received Fifth Amendment protection solely because the Court assumed that he started from a baseline of being entitled to his contractual relationship with the state. Nothing in the Constitution prevents the state from shifting this baseline. The state might have said that contractors can do business with it only if they bear the burden of proving that they have not engaged in bribery. *Rylander* appears to mean that if the state phrases the initial entitlements in this way, the *Lefkowitz* protection evaporates.⁹⁵

92. 460 U.S. at 754-55.

93. 460 U.S. at 757.

94. 460 U.S. at 758.

95. Consider, for example, the problem posed by *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984). Congress conditioned the receipt of federal financial assistance for higher education on male students' registering for the draft. See 50 U.S.C. app. § 562(f) (1988). The statute further required students requesting aid to file a statement attesting to their compliance with the draft registration statute. Students who had not registered challenged the requirement, arguing that it compelled incriminating statements in violation of the Fifth Amendment.

The Court's decision focused on the alleged compulsion to register created by the scheme. Although revelation of the student's birthday on the registration form might be incriminating, the Court held that a student could claim a Fifth Amendment privilege at that point. 468 U.S. at 858.

Suppose the Court had focused instead on the compulsion to file a statement of compliance with the draft. At first blush, it might seem that the case is indistinguishable from *Lefkowitz*. On closer analysis, however, it becomes apparent that the scheme does not compel students to reveal the incriminating fact of nonregistration. True, they will be denied financial assistance if they attempt to claim their Fifth Amendment privilege by refusing to file the form. But they will also be denied financial assistance if they state on the form that they have failed to register. Because they are treated no differently whether or not they claim the privilege, they are not compelled to reveal incriminating information.

Fifth Amendment cases decided in a regulatory setting rest on precisely this analysis. The required records exception holds that a participant in a regulated industry has no Fifth Amendment right to withhold records that are required by a regulatory scheme.⁹⁶ In announcing the exception, the Court relied upon the fact that "the Government can constitutionally regulate or forbid the basic activity concerned."⁹⁷ This greater authority effectively shifted the baseline so that the government could also "require the keeping of particular records, subject to inspection by the Administrator,"⁹⁸ as a condition of engaging in the underlying activity.

Many people are uncomfortable with these results, partially because they seem to torture ordinary language. Individuals pressured by the denial of crucial benefits have "chosen" to incriminate themselves in only a Pickwickian sense. At base, the reason for this discomfort is that post-*Lochner* analysis makes ordinary-language understandings of freedom and coercion incoherent. It is always true of every choice that it is made against a backdrop of government actions and nonactions that makes one choice more desirable than the other. What, then could it possibly mean for an individual to act "freely"?

In the post-*Lochner* intellectual environment, the Fifth Amendment can be rescued from incoherence only by reformulating it so that it is not about individual will after all. Because exercises of will never occur in a vacuum and are always influenced by government, what matters is not whether individuals have freely chosen but the legitimacy of the background conditions that dictate the choice.

Once this much is conceded, however, it is hard to see the sense in which the Fifth Amendment protects individual rights. If we are dealing not with individual choice but with publicly created background conditions, it would seem that all decisions become social and collective and that no room remains for decisions by autonomous individuals.

Further difficulties emerge when we try to establish limits on the ability of government to manipulate background conditions. Even after the demise of *Lochner*, we are not ready to give up entirely on

The absence of compulsion derives from the government's shifting of the baseline. In order to receive financial assistance, students have the burden of demonstrating compliance with the draft law. The state could have achieved a similar outcome in *Lefkowitz* by requiring contractors affirmatively to establish the legality of their previous contracting activities.

96. See *Shapiro v. United States*, 335 U.S. 1, 17, 33 (1948).

97. 335 U.S. at 32.

98. 335 U.S. at 32.

the existence of natural and prepolitical baselines. Suppose, for example, the government tried to reverse Rousseau's famous observation and proceeded on the assumption that people are born in chains but everywhere are free. Presumably, the Court would not sit still for the evisceration of the Fifth Amendment by making defendants bear the burden of proving that they are innocent in order to get the "benefit" of nonincarceration.

Unfortunately, however, the rejection of *Lochner* makes it difficult to evaluate the justice of various background conditions. During the *Lochner* era, the Court attempted to generate these conditions by imagining what individuals would choose in some prepolitical state.⁹⁹ The *Lochner* regime collapsed in part because it became apparent that the people doing this imagining were already located politically and that this location significantly influenced their imaginings. The upshot was that the attempt to generate background conditions led to a circle: The conditions were generated by what individuals would choose, but individual choice was a product of the conditions.

As a result, in the post-*Lochner* intellectual environment, our intuitive feel for constitutionally mandated baselines is fragile and contextually contingent. For example, it apparently remains true that the government may not start with the assumption that everyone belongs behind bars with the burden of proving why they should become free. But as soon as one moves from this extreme position, there is little else that can be said with certainty. Thus, the Court has made a complete hash out of determining precisely when the Constitution requires that conduct be considered a part of the offense — which the government must prove beyond a reasonable doubt — and when it is an affirmative defense that the defendant must bear the burden of proving in order to avoid incarceration.¹⁰⁰

Similarly, one would have thought that if there were any natural baseline that was widely accepted in our society, it would be the right of biological parents to raise their children. Yet in a case con-

99. See Peller, *supra* note 3, at 1193-219.

100. See John Calvin Jeffries & Paul B. Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1346-47 (1979) (arguing that when a defense is "gratuitous" in the sense that the state legislature could shift the baseline by denying it altogether, the defendant cannot complain when it is recognized, but the State is not required to prove its absence beyond a reasonable doubt). Compare *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (holding unconstitutional a murder statute that required the defendant to bear the burden of rebutting a statutory presumption that he had committed the offense with malice aforethought) with *Patterson v. New York*, 432 U.S. 197 (1977) (upholding the constitutionality of a statute requiring the defendant to bear the burden of proving an affirmative defense of extreme emotional disturbance).

cerning a child born of an adulterous relationship, the Court held that even these rights are rooted in positive law that the state is free to change.¹⁰¹ The implications for the Fifth Amendment are obvious, yet startling nonetheless. In *Baltimore Department of Social Services v. Bouknight*,¹⁰² the Court made an analogy between child rearing and a regulated industry¹⁰³ and thus held that Ms. Bouknight was not coerced when her right to custody of her child was conditioned on her willingness to act in a fashion that could incriminate her.

* * *

So privacy has a problem, all right, but the problem is not about information. It is about nothing less than hanging onto a conception of ourselves as autonomous individuals living private lives in the post-*Lochner* intellectual environment. Of course, in one way or another, we have managed to hang onto this conception. Giving up on it is giving up on too much of our internal experience — of how we see ourselves and how we conceptualize the lives we lead. Post-*Lochner* ideology leaves us caught between this experiential reality, which is too real to abandon, and a legal environment, which no longer provides it much support.

In short, privacy's problem is the central problem for modern constitutional law. Patching up a few criminal procedure doctrines is not likely to produce a solution.

101. See *Michael H. v. Gerald D.*, 491 U.S. 110, 118-30 (1989).

102. 493 U.S. 549 (1990).

103. 493 U.S. at 558-59.