

KILLER SEATBELTS AND CRIMINAL PROCEDURE

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Replying to William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006).

In a famous article published thirty years ago, an economist named Sam Peltzman argued that seatbelts and other mandated safety devices in cars had done little good. Sure, they made crashes less dangerous. But drivers responded by taking less care. The result was only a modest drop in driver and passenger fatalities, fully offset by a rise in pedestrian deaths — at best no net benefit and arguably a change for the worse.¹ The article caused a sensation. The results were attractively counterintuitive, the argument was ingenious, the underlying idea about human behavior made a certain amount of sense, and the implications were wide-ranging. The narrow lesson was that people had stubborn preferences, including for the risks they ran, and those preferences resisted modifications imposed from above. The broader lesson was that there were more things in heaven and earth than regulators understood. Social complexity undid social engineering.

Peltzman's argument eventually acquired the colloquial shorthand "killer seatbelts." It has provided the template for several decades' worth of scholarship reaching similarly counterintuitive results, and teaching similarly humbling lessons, about virtually every sacred cow of the Great Society. Professor William Stuntz's new article, *The Political Constitution of Criminal Justice*, is a particularly impressive contribution to that large literature.² Like most everything Stuntz writes, the article resists summary. It is full of sharp observation and wise counsel on a staggering range of criminal justice topics, from police tactics to prison spending. Stuntz squeezes more insight onto a single page than most of us manage to put in a whole article. But the core of his argument is this: the "criminal justice revolution" — the constitutional regulation of criminal justice initiated by the Warren Court and continued, sometimes half-heartedly, by its successors — has worsened the very ills it was intended to remedy. Politicians have reacted to new constitutional rules in criminal justice by abandoning innovation in areas regulated by the Supreme Court and by shifting

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¹ Sam Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. POL. ECON. 677 (1975).

² William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006).

spending away from those areas to other areas where it does less good. Criminal justice would be better without the Court's intervention. It would be better still if the Court intervened in smarter ways — ways calculated to make politics healthier rather than to override it.

In the decades since Peltzman's classic article, automotive safety requirements have continued to proliferate, and highway deaths have continued to fall — for pedestrians and vehicle occupants alike.³ The weight of the evidence now suggests that if safety devices lead to less careful driving, the effect is far more modest than Peltzman suggested, and not nearly enough to offset the benefits of the devices.⁴ It turned out that the unanticipated, secondary effects of highway safety regulation were less important than their straightforward, expected effects. Peltzman was mistaken.

I think Stuntz is mistaken, too, and for a similar reason: he has overestimated the importance of unanticipated, secondary effects. I should say at once that this does little to detract from the considerable value of Stuntz's article, because — as always — Stuntz has much to teach us. He is utterly convincing, for example, when arguing that criminal procedure law pays too little attention to systemic issues of inequality and nonfeasance; that the quality of justice dispensed by our criminal justice system depends in part on how much we are willing to spend on it; and that law and politics help to shape each other, in criminal justice as elsewhere. He is plainly right, too, that legislatures have a mixed record protecting the interests of people stopped or investigated by the police and a far worse record providing fair treatment to convicted criminal defendants. But I think Stuntz is wrong to blame the legislatures' failures on the courts and wrong to suggest that the politicians would likely do better if the judges would simply leave them alone.

My reasons for skepticism are threefold. First, judicial rulings *haven't* significantly impeded the ability of politicians to control the police. Second, politicians *haven't* done a better job regulating those aspects of criminal procedure that courts have left entirely alone or have addressed, as Stuntz recommends, with default rules. Third, there are simpler explanations for the political pathologies that Stuntz identifies — including an explanation that Stuntz himself provides.

Let me take these points in order.

³ See, e.g., INS. INST. FOR HIGHWAY SAFETY, FATALITY FACTS 2004: GENERAL (2005), http://www.hwysafety.org/research/fatality_facts/pdfs/general.pdf.

⁴ See, e.g., Alma Cohen & Liran Einav, *The Effects of Mandatory Seat Belt Laws on Driving Behavior and Traffic Fatalities*, 5 REV. ECON. & STAT. 828 (2003); James Hedlund, *Risky Business: Safety Regulations, Risk Compensation, and Individual Behavior*, 6 INJ. PREVENTION 82, 84 (2000).

Start with legislators' ability to control the police. Stuntz argues that legislatures spend on prisons rather than police (or, to a lesser extent, criminal prosecution and adjudication) because constitutional law takes away their control of the police (and, to a lesser extent, trials and plea bargaining). He also claims that legislatures regulate substantive criminal law and sentences rather than police (or prosecutors and trials) because the Supreme Court has taken over responsibility for regulating the police (and prosecution and adjudication). In each case the pivot on which the argument turns is the claim that the Supreme Court has blocked legislatures from controlling the police — and, to a smaller degree, criminal prosecution and adjudication.

But it hasn't. Set aside prosecution and adjudication, and focus on police, where Stuntz says the usurpation has gone furthest. Constitutional law regulates when the police can search or seize, and it tells the police what they must do before interrogating a suspect held in custody. But it says virtually nothing about the vast majority of decisions made by the police. For example, the Supreme Court has said nothing, or next to nothing, about how large police forces should be, how they should be organized, how officers should be deployed, what patrol strategies they should follow, what protocols they should follow when they talk with people they have not "seized," when and how officers should use nonlethal force, when and how the police should use undercover agents and confidential informants, what inducements the police can offer people to inform against their friends or relatives, or how insulated the police should be from local politics. Constitutional criminal procedure leaves legislatures ample room to regulate the police.

And, in fact, legislatures do regulate the police. Not as much as they should but enough to dispel the notion that politicians feel the police are off limits. Stuntz himself describes legislative regulation of policing as "common" (probably an overstatement) and he offers several good examples: statutory protections for sensitive records and communications, congressional authorization of injunctive relief against police departments that engage in patterns of misconduct, and state initiatives to curtail racial profiling. Most of these laws, as Stuntz acknowledges, were passed after, not before, the Warren Court "constitutionalized" criminal procedure in the 1960s. Stuntz says legislators have regulated policing and procedure only where the Supreme Court has not "occupied the relevant field." Politicians, he says, "tend to fill whatever regulatory space constitutional law leaves open."⁵ This isn't convincing, for reasons I'll get to momentarily. But even granting the point, the history of regulation Stuntz describes — particularly in combination with the broad range of policing topics on which the

⁵ Stuntz, *supra* note 2, at 797, 798.

Court has had little or nothing to say — makes it hard to argue that legislatures have shrunk from funding police because they would rather spend on things they can control, like prisons.

This isn't to say police departments are easy for legislatures to control. They're not. But they are almost certainly easier for legislatures to control than prisons, which are hidden from sight, notoriously difficult to monitor, and (partly for those reasons) often tightly constrained by court orders these days.⁶ Even the most basic features of prisons — their size and the number of inmates they house — have proven surprisingly resistant to legislative management.⁷ Yes, politicians often find police departments hard to manage, but not to this extent. And the difficulty that legislatures *have* encountered in supervising the police cannot fairly be laid at the feet of the courts. The major impediment to legislative control of law enforcement has not been constitutional law, but rather the extraordinary degree of autonomy that police departments won in the middle decades of the twentieth century as part of a broad effort to make them more “professional.” The police professionalism movement received some reinforcement from the Warren Court's criminal procedure rulings, but it began well before those rulings and never depended on the Court's assistance.⁸ And while some aspects of police professionalism have been rolled back over the past twenty years under the banner of “community policing,” police departments have largely preserved their operational independence.⁹

What of the suggestion that legislatures have regulated policing more aggressively in areas the Supreme Court has left alone? Stuntz's examples don't really show that. Instead they illustrate a different dynamic: a back-and-forth conversation between the judiciary and the political branches, each at times following the lead of the other. Take, for example, the laws governing electronic surveillance. In the 1920s, wiretapping was statutorily prohibited in many states and banned as a matter of policy by federal investigative agencies. When the Supreme Court unexpectedly announced that the Constitution permitted the use of wiretap evidence in criminal prosecutions,¹⁰ the Prohibition Bureau

⁶ See generally MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998).

⁷ The classic study is FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* (1991). See, e.g., *id.* at xii.

⁸ On police professionalism and the autonomy it granted police departments, see, for example, ROBERT M. FOGELSON, *BIG-CITY POLICE* 167–92 (1977); HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* 134–36 (1977); Egon Bittner, *The Rise and Fall of the Thin Blue Line*, 6 *REV. AM. HIST.* 421, 426–27 (1978); and David Alan Sklansky, *Police and Democracy*, 103 *MICH. L. REV.* 1699, 1742–45 (2005).

⁹ See, e.g., Michael E. Buerger, *The Limits of Community, in THE CHALLENGE OF COMMUNITY POLICING: TESTING THE PREMISES* 270 (Dennis P. Rosenbaum ed., 1994); Gerald Frug, *City Services*, 73 *N.Y.U. L. REV.* 23, 81 (1998).

¹⁰ *Olmstead v. United States*, 277 U.S. 438 (1928).

promptly responded by openly embracing the practice.¹¹ The Court slowly backtracked, first by creatively reading a ban on wiretap evidence into a federal statute that in fact said nothing about the admissibility of intercepted conversations,¹² then — when Congress did not object to the words the Court had put in its mouth — by narrowing the scope of the earlier constitutional holding,¹³ and eventually by striking a compromise: electronic eavesdropping was constitutionally permissible, but only with a warrant based on a showing of probable cause.¹⁴

That compromise followed the pattern set by a good number of state statutes, and it triggered, in turn, federal legislation along the same lines.¹⁵ Congress later extended the scope of the Court's compromise, requiring warrants for foreign intelligence wiretaps¹⁶ and for interception of calls made on cordless telephones.¹⁷ Meanwhile, the Court held the constitutional restrictions on searches inapplicable to "pen registers" (which record the numbers dialed on a telephone) and "trap and trace" devices (which log similar information about incoming calls).¹⁸ Congress responded by requiring court orders for those devices but *without* any showing of probable cause; issuance of the order is virtually automatic.¹⁹ That regime, in turn, was later extended statutorily to govern the monitoring of address information on e-mail messages.²⁰

This is not a story of legislatures filling regulatory space left open by the Court, or of the Justices filling regulatory space left open by the politicians. It is a story of constitutional law and statutory innovation sharing a regulatory space, to their mutual benefit. The storyline is similar, if less elaborate, for state and local measures to combat racial profiling (which build on the Court's determination that investigatory detentions require a reasoned basis but not probable cause²¹) and for

¹¹ See WALTER F. MURPHY, WIRETAPPING ON TRIAL 13, 125–29, 133 (1965); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 840–43 (2004).

¹² *Nardone v. United States*, 308 U.S. 338 (1939); *Nardone v. United States*, 302 U.S. 379 (1937).

¹³ *Silverman v. United States*, 365 U.S. 505 (1961).

¹⁴ *Katz v. United States*, 389 U.S. 347 (1967).

¹⁵ See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. III, 82 Stat. 211 (codified as amended at 18 U.S.C. §§ 2510–2522 (2000)).

¹⁶ See Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified in pertinent part, as amended, at 50 U.S.C. §§ 1801–1811 (2000)).

¹⁷ See Communications Assistance for Law Enforcement Act of 1986, Pub. L. No. 103-414, § 202(a), 108 Stat. 4279 (codified as amended at 18 U.S.C. § 2510(1), (12)).

¹⁸ See *Smith v. Maryland*, 442 U.S. 735, 745 (1979).

¹⁹ See 18 U.S.C. § 3121(a).

²⁰ See Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 2510–2521).

²¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

the equitable relief Congress has authorized the Department of Justice to seek against police departments engaged in a “pattern or practice” of illegality²² (which provides an interstitial remedy for behavior condemned by the Court but immune, as the Court made clear it often would be, to correction by evidentiary exclusion²³). In each case the legislation extends the logic of the Court’s rulings and fills in gaps left by those rulings. The “changed political preferences” Stuntz identifies — the ways in which Americans (and their elected representatives) “value both privacy and process more than they once did”²⁴ — have more than a little to do with the parallel changes in constitutional law, and the causation likely runs in both directions.

When the Court truly has left the political branches with a blank slate regarding the regulation of law enforcement, the slate has tended to remain blank. Take, for example, the use of covert investigations. Constitutional law says virtually nothing about the government spying on people by abusing their trust — infiltrating a protest group with a police officer, say, or bribing people to inform against their family and friends. It is hard to find a more gaping hole in the protections provided by search-and-seizure doctrine.²⁵ But legislatures have done little to fill it.²⁶ Or take the problem of law enforcement nonfeasance. The Court has stayed away from this problem, too; it has set no standards of any kind for minimally adequate policing. Stuntz rightly faults constitutional criminal procedure for “its exclusive focus on action rather than inaction.”²⁷ But statutory controls on the police tend to have the same focus. Or take *how* the police seize someone — how courteous they are, how well they explain themselves, the degree of force they use or threaten, and so on. Deadly force aside, the Supreme Court has said little about any of these questions, and Stuntz has argued cogently, here and elsewhere, that this is a major failure.²⁸ Once again, though, legislators have done little better.

Are default rules the best way for the Court to get the political branches to respond? Maybe, but the evidence is not encouraging. Stuntz suggests, for example, that legislatures might have devised bet-

²² 42 U.S.C. § 14141 (2000).

²³ See *Terry*, 392 U.S. at 13–15.

²⁴ Stuntz, *supra* note 2, at 801.

²⁵ For helpful discussions, see GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA (1988); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645 (2004).

²⁶ See, e.g., Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 46 (2001); Jim Dwyer, *New York Police Covertly Join In at Protest Rallies*, N.Y. TIMES, Dec. 22, 2005, at A1.

²⁷ Stuntz, *supra* note 2, at 835–36.

²⁸ *Id.* at 816; see also, e.g., William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1062–68 (1995).

ter rules for questioning suspects if the *Miranda* rules had been framed as a default regime.²⁹ But they *were*. When the Court decided *Miranda v. Arizona* in 1966, here is what it said about the status of the rules it was announcing:

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional strait-jacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.³⁰

It is difficult to imagine how the Court could have been more explicit. Stuntz argues that the Court's decision decades later in *Dickerson v. United States*³¹ shows the Justices were "never serious" about welcoming alternative solutions to the problem of involuntary confessions.³² But the federal statute struck down in *Dickerson* purported simply to overrule *Miranda* and to turn the clock back to 1965. It was "a gesture of defiance," not an effort to take the Court at its word.³³ And in striking it down the *Dickerson* Court reaffirmed that the Constitution "does not require police to administer the particular *Miranda* warnings" but does "require a procedure that is effective in securing Fifth Amendment rights."³⁴

What's noteworthy is that the federal statute struck down in *Dickerson* was the *only* legislative effort ever to get around the *Miranda* rules, and one of only a handful of post-*Miranda* statutes regulating interrogations. *Miranda* was as clear a case of a default rule as we are ever likely to see; Professors Dorf and Sabel single it out as a paradigmatic call for "experimental elaboration of legal norms."³⁵

²⁹ See Stuntz, *supra* note 2, at 792–94.

³⁰ 384 U.S. 436, 467 (1966).

³¹ 530 U.S. 428 (2000).

³² Stuntz, *supra* note 2, at 792 n.71.

³³ Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 127; see also, e.g., FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 319–20 (1970); Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 71–72; Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 460 (1998).

³⁴ *Dickerson*, 530 U.S. at 440 n.6.

³⁵ Dorf & Sabel, *supra* note 33, at 403.

But it didn't work — maybe because the rules crafted by the Court were a broadly acceptable compromise, maybe (as Dorf and Sabel suggest) because legislatures were unwilling to place convictions at risk by gambling that the Court would approve an alternative approach to safeguarding Fifth Amendment rights,³⁶ or maybe for a different reason. (I'll return to that last possibility in a moment.) Regardless, the *Miranda* story suggests it is easier for the Court to craft workable rules of criminal procedure than to engineer the legislative reactions to its rulings. The moral, if there is one, is to focus on the foreground.

If constitutional criminal procedure isn't to blame for the political pathologies Stuntz describes so convincingly, what is? Why do legislators spend on prisons rather than on police? Why are sentencing laws so harsh? Why don't politicians fix the racial biases of our criminal justice system and better regulate the police?

The simplest explanation is also the most obvious: political power. White voters, for example, don't dominate our electoral system as fully as they used to, but minority interests remain — well, minority interests. Criminal suspects may not be politically defenseless, but neither are they a particularly strong constituency. And as Stuntz himself points out, people stopped or investigated by the police are more numerous, more sympathetic, and better connected than convicted criminals. That leads legislators — as well as judges — to care still less about the back end of the criminal process than about the front end, and in particular to worry even less about excessive imprisonment than about excessive policing. The myopia of both branches is baneful. But the legislators are not to blame for the judges' failure, and the judges are not to blame for the legislators'.

There may be something else at work, too, something that does link what the judges do with what the politicians do, and not always in a helpful way. Decades before Sam Peltzman argued that seatbelts make drivers reckless, James Bradley Thayer warned, even more famously, that constitutional law makes legislators reckless. In “perhaps the single most influential piece of legal scholarship in American history,”³⁷ Thayer worried that constitutional rulings tend “to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows.”³⁸ Surely

³⁶ See *id.* at 459–63.

³⁷ WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 125 (1994); see also, e.g., KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION 177 (1993); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 7 (1983); David A. Sklansky, *Proposition 187 and the Ghost of James Bradley Thayer*, 17 CHICANO-LATINO L. REV. 24, 25–33 (1995).

³⁸ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155 (1893). On the same theme, see JAMES BRADLEY THAYER, JOHN MARSHALL 106–07 (1901).

there is something to this. Constitutional law can let politicians off the hook; once the Court weighs in, legislators can move on to other questions. *That* may be why the default rule in *Miranda* never spurred legislative innovation, aside from the symbolic enactment struck down in *Dickerson*. The *Miranda* warnings may not be the best solution imaginable to the problem of coerced confessions, but they were a workable solution, and once that became clear legislators lost interest in the problem. A similar dynamic may explain why Congress has hewed closely to constitutional minima in fashioning protections against electronic surveillance. Once the Justices have outlined the contours of constitutional protection, legislators may think the safest course, politically, is to follow the Court's lead.

That means there can be a cost to even the soundest constitutional rulings. Just by entering the fray, the Court can make it easier for legislators to stay out. That risk should be recognized — but it is speculative, and it should not be overestimated. Perhaps legislators would have found better solutions to the problem of coerced confessions if the Court had denied relief in *Miranda*. But statutory solutions had not materialized in the decades before *Miranda*, and the contemptuous response Congress gave to *Miranda* does little to inspire confidence that things would have changed. Perhaps legislators would have adopted stronger protections against electronic surveillance if the Court had stuck to its position that wiretapping was not a “search” or “seizure” regulated by the Constitution. But it seems at least as likely that prohibitions on electronic snooping would have remained spotty and, in the view of many law enforcement officers, merely hortatory. Perhaps legislators would feel more responsibility to regulate policing across the board if the Supreme Court had stayed completely out of the picture. It seems unlikely, given how little legislatures have done in those areas of policing the Court *has* left alone, but it's possible. What we know for certain is that without the Court's involvement we would have lost the specific protections that the Court itself provided — “the limited but concrete support for constitutional rights that comes from actual legal remedies.”³⁹ In constitutional law as in accident prevention, primary effects are a good deal more predictable than secondary consequences, and they make a surer guide for statecraft.

³⁹ Thomas C. Grey, *Thayer's Doctrine: Notes on Its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28, 41 (1993); see also Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 11–12 (1984).