

the Atlantic

A Matter of Life and Death: The Danger of an Out-of-Control State

Pushing back on abuses by a small but powerful faction of the criminal-justice system requires a bipartisan coalition.

[Norm Ornstein](#)

September 11 2014, 11:13 AM ET

The power of the State—of government, in other words—is awesome. And nowhere is that power greater than when it controls life, death, and liberty. The Framers knew this kind of power can corrupt and believed in the principle, articulated much later by Lord Acton, that absolute power corrupts absolutely. They also believed that such power could be grossly misused in the hands not just of individuals acting on behalf of the State but also on behalf of the majority population, creating, in the words of John Adams, "tyranny of the majority." The whole constitutional structure, and the civil liberties built into the first 10 amendments to the Constitution, are grounded in those beliefs.

That immense power over liberty and life is especially evident in the criminal-justice system, in the hands of police and prosecutors. The deep suspicion of governmental power that animates not just the Framers but also philosophical conservatives demands a vigorous effort to curb that power and provide the necessary and appropriate checks and balances to the police and prosecutors who wield it. That effort has rarely been there, with notable exceptions in the libertarian world that I will discuss below.

Why? One main reason is that conservatism has another strain: of intense respect for the existing order, a fear that it can be undermined by crime or disorder, and the belief that police and prosecutors are the front line of protecting that order. Another reason is that the abuses of power are most harmful to those who are weak, limited, and poor, and disproportionately minorities. There is a racial element here, but one does not have to be racist to believe that arrests or traffic stops by police, or stop-and-frisk policies, only occur where crimes have been committed or there is real and reasonable suspicion of same—and that if one is not guilty, one will either go free or suffer the indignity of an undeserved traffic ticket; no big deal. That bigger indignities are suffered by the poor and minorities doesn't resonate for those who have never experienced the problems.

Michael Brown and Ferguson, Missouri, along with [Eric Garner](#), the Staten Island man killed by a police choke hold, have put questions about police misconduct squarely in the public square recently—in Ferguson, not just in the death of the unarmed teen but also in a long history in the county of harassing minorities and shaking them down for money to finance police operations, and in the unsettling pictures of police snipers aiming at demonstrating crowds from tank-like military vehicles. Brown and Garner are only the most visible of countless cases in which these powers have corrupted, and in which the victims are disproportionately minorities but include plenty of non-minorities as well.

Brown's case ignited a major national debate, but other incidents happen every day. Last year, we had the horrific case of [John Geer](#) in Springfield, Virginia, shot as he stood, unarmed, inside the front doorway of his house after a minor domestic dispute; when his children and other family tried to administer aid, police allegedly blocked them while he bled to death. A year later, there has been no explanation, no charges filed, no communication from prosecutors or police to his family, which has sued. There are many others, including those where police fired dozens or hundreds of bullets at individuals sitting in their cars.

Shooting deaths are obviously horrific. At the same time and for good reason, we cut police a lot of slack in confrontations; they are in the line of fire, and many officers are killed on duty. But there need to be sanctions for those who abuse their power over life and death, or who clearly overreact. And common police protocols where shooting to kill is the norm, and other means to disable individuals who are threats or perceived threats are not actively encouraged, need rethinking and redrawing.

But cases like Brown, Garner, or Geer, though way too prevalent, are not the only big problem here. The new power of DNA evidence along with the remarkable tenacity of the Innocence Project and other comparable efforts have uncovered hundreds of cases of wrongful imprisonment—and some of wrongful capital punishment. Consider the case of Cameron Todd Willingham. From the mesmerizing [account in 2009](#) by David Grann in *The New Yorker* to the excellent [story](#) in *The Washington Post* by Maurice Possley of the Marshall Project, it is compellingly clear that Willingham was wrongfully executed in Texas for deliberate arson that killed his wife and children, a crime he did not commit. It is also clear that from prosecutor [John H. Jackson](#), who allegedly manipulated a jailhouse informer to turn on Willingham, to the indifference, at best, of parole authorities and Governor Rick Perry, to exculpatory evidence, there was a shocking level of unconcern or worse about putting to death a man whose guilt was at least in question.

There was a shocking level of unconcern about putting to death a man whose guilt was at least in question.

Or consider the case of brothers [Henry Lee McCullom and Leroy Brown](#), who served 30 years in prison for the brutal rape and murder of an 11-year old girl with McCullom on death row, the case that was repeatedly used by Justice Antonin Scalia to justify the death penalty. Both were just released after evidence clearly tying the crime to a man already in prison for another brutal crime. McCullom and Brown were convicted based on the clumsily coerced confession of a young man with an IQ under 60, and with evidence exonerating the two and pointing in another

direction that was never brought to the fore by police or prosecutors—a prosecutor who even today, astonishingly, still insists the two were guilty.

Then consider what might be the ultimate pattern of prosecutorial misconduct, the astonishing multiple violations of former New Orleans District Attorney Harry Connick Sr. and his team of prosecutors, who sent a roster of wrongly convicted people, including [John Thompson](#) and 16-year-old [Shareef Cousin](#), to death row or life without parole, by allegedly manipulating evidence and witnesses, lying to defense attorneys and judges. In the Thompson case, if it were not for public interest help and a diligent private investigator finding exculpatory blood evidence that prosecutors and police had withheld, he would be dead today.

There is the power over life and death. There is also the power over property and liberty. We had the celebrated case of prosecutorial misconduct in the trial over misuse of office by the late Senator Ted Stevens of Alaska. [A recent series of pieces in *The Washington Post*](#) examined stop-and-seize programs and the Black Asphalt system—the increasingly popular efforts by police and private entities to raise huge sums of money by stopping cars for minor or nonexistent traffic violations, manipulating drivers and passengers to search the cars, and then seizing cash and property, which they use for their own programs and for gain. These programs were ramped up after 9/11 to combat terrorism and fight drug trafficking but have morphed into something more, with the illicit sharing of sensitive data about people never charged with any crime, the targeting of individuals for more such stops, and the wrongful seizure of a lot of money from people who may never get it back, or which will require even more money and valuable time to recapture their legitimate assets.

The *Post* stories also make it clear that there is a broad, unholy alliance between law-enforcement officials and agencies and private operatives who seem like the privatized Blackwater "soldiers" who raged out of control in Iraq—including with the active connivance and limited oversight of the Justice Department and the Department of Homeland Security. Here the lack of concern about fundamental abuses of power and hijacking of civil liberties crosses all party and ideological lines to include Eric Holder's Justice Department—as does the enthusiasm for sending sophisticated military equipment to local police ill-prepared to use it.

The lack of concern about abuses of power and hijacking of civil liberties crosses all party lines.

Senator Rand Paul has decried this militarization of police—but [as Jonathan Chait notes](#), the issue is a much broader one and is a problem rooted less in Washington or centralized power and more in local areas, what he calls Big Small Government. And he notes that many of the officials contributing to Big Small Government are Democrats and liberals who have been reluctant to focus on problems in their own bailiwicks.

This mind-set is not universal. The fiercely libertarian Cato Institute's [National Police Misconduct Reporting Project](#) regularly updates cases of misuse of this vast governmental power; the public recognition of the cases makes it far more likely that they will be handled appropriately and thus more likely that checks and balances will work to limit abuse. There is growing awareness that the broad application of body cameras on police can sharply reduce

complaints of misconduct or abuse—and provide evidence of appropriate police use of force to counter false allegations.

Of course, the vast majority of police and prosecutors are not only operating within the bounds of propriety but also doing jobs that are necessary for the society to function, while often putting themselves in real danger. But we clearly now need a broad political coalition to step back and debate even more constructive ways of striking a better balance protecting citizens and civil liberties at the same time, and providing vigorous checks against the many forms of corruption that flourish with unrestrained power.