

# Reverse Broken Windows

Christopher R. Green

## 1. A Tale of Two Reports

On March 4, 2015, the Department of Justice released two reports related to Michael Brown's death at the hands of Ferguson, Missouri, police officer Darren Wilson on August 9, 2014. Brown's death produced two waves of violent protests, one immediately after the shooting, lasting a few weeks, and another beginning on November 24, 2014, after a grand jury declined to indict Wilson.

One 86-page report<sup>1</sup> meticulously detailed all of the evidence about Brown's shooting, concluding that evidence would not support a federal prosecution for unreasonable use of deadly force. A 105-page report,<sup>2</sup> however, revealed a great number of racial disparities in the practices of the Ferguson police department and municipal court, including (a) a focus on extracting revenue from, rather than supplying protection to, its citizenry; (b) widespread violation of the reasonable-suspicion requirement for stops and frisks; (c) arrests in retaliation for expressions of contempt for the police; (d) racially disparate and unnecessary use of dogs and Tasers to arrest African-American defendants; (e) a *lower* rate of drug possession among black citizens searched by police, despite a much higher rate of being searched if stopped.

This very brief essay will consider some of the implications of the Ferguson Report for how we understand the Brown Report, particularly the amazing number of witnesses initially claiming to have seen spectacular police misconduct. In short, it seems quite likely that police misbehavior over relatively low-level issues, like stop-and-frisk and arrest practice, led huge parts

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1. U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (2015) [hereinafter BROWN REPORT].
2. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) [hereinafter FERGUSON REPORT].

of the black community to disbelieve police and grand jury assessments of the Brown-Wilson situation, encouraging the August and November waves of violence.

The “broken windows” theory of social order holds that maintaining order on high-level issues like murder, vandalism, and assault requires the maintenance of order on low-level issues like jaywalking, trespassing, public drunkenness, and the like.<sup>3</sup> A corresponding theory, I suggest, applies to perceptions of police legitimacy: The maintenance of law enforcement officials’ credibility with respect to the most serious accusations of misbehavior—*i.e.*, whether a police officer would summarily execute an unarmed black man like Michael Brown posing no threat to the office—depends on police credibility with respect to everyday practices like stop-and-frisk policy. Police officers must, of course, defend themselves when attacked, and their work protecting crime victims is the first duty of government. But police cannot perform their most critical protective tasks without the trust of the citizenry, and that trust depends on police performing even their most minor tasks fairly and equitably. That did not happen in Ferguson.

The bulk of this essay is inspired by the work of Bill Stuntz, who taught me criminal law in the fall of 1996.<sup>4</sup> If something like Ferguson had happened before Stuntz died in 2011, I would certainly have waited to hear what he had to say before offering my own thoughts. I therefore take “What Would Bill Stuntz Say?” as my muse-guiding heuristic.

The relationship between the Ferguson and Brown reports illustrates the reverse-broken-windows dynamic. That dynamic touches several topics studied in the law school curriculum—criminal law, criminal procedure, and constitutional law—without fitting neatly into any of them, because they are areas *not* covered by the law.<sup>5</sup> Analysis of the two Ferguson reports offers several important ways in which law school curricula could be supplemented to address what the law *doesn’t* cover, as well as what it does.

First—as Stuntz began by teaching his criminal-law students twenty years ago—the criminal law that appears in appellate opinions focuses only on the outer *boundaries* of criminal liability, and only in cases where police have already investigated a suspect and a prosecutor has already decided to proceed with a case. Prosecutorial and police discretion *within* those boundaries, however, is largely lawless and opaque. Legislators pass enormously broad criminal statutes knowing that prosecutors need not enforce them to their full extent;

3. See James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Activity*, ATLANTIC MONTHLY, March 1982.
4. Stuntz was a professor at the University of Virginia and then Harvard for many years; he visited at Yale during the 1996-1997 school year. His posthumously published magnum opus was *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011) [hereinafter CACJ].
5. Cf. Arthur Conan Doyle, *Silver Blaze*, in 1 *THE COMPLETE SHERLOCK HOLMES*, 335 (Doubleday & Co. ed. 1930) (1894) (“‘I draw your attention,’ said Holmes, ‘to the curious incident of the dog in the night-time.’ ‘The dog did nothing in the night-time,’ replied Gregory. ‘That,’ said Holmes, ‘was the curious incident.’”).

prosecutors and the police are far more important lawmakers in our system of criminal justice than the actual legislatures. Because such areas of discretionary decision-making lie outside a narrow conception of *law*, it is very easy to leave them outside law school curricula as well. At the same time, much data suggests that the fairness of these ungoverned, opaque, discretionary processes of executive discretion is a key ingredient to the ability of the criminal justice system to foster social order.

Second, criminal procedure law considers in great detail the outer boundaries of *when* police may search, question, detain, or arrest suspects. Very little law, however, governs *how* police conduct these activities. In particular, the harshness of arrest procedures is governed only by a very general standard. Police behavior in Ferguson, and a long line of other very recent events—from the death of Eric Garner in New York following his “I can’t breathe” arrest to the death of Sandra Bland in Texas following her no-smoking-in-the-car “I will light you up” arrest—cry out for more fine-grained scrutiny than current law supplies.

Third, the law of executive discretion most directly applicable in the Ferguson case—that is, state constitutional and state administrative law—receives little or no systematic attention in constitutional law courses. It should not take a *federal* government investigation for local police and prosecutorial practices to receive legal scrutiny. State constitutional and administrative law offers ample unexplored avenues for accountability, transparency, and improved legitimacy in the processes revealed in the Ferguson Report. State attorneys general, in particular, should take the initiative in probing the extent of their powers to require administrative regularity of local district attorneys and local law enforcement.

## **2. Criminal Law: Perceived Legitimacy as a Critical Element of Criminal-Law Effectiveness**

Tom Tyler’s 1990 study of Chicago<sup>6</sup> and its scholarly progeny<sup>7</sup>—and an intellectual tradition going back to Max Weber and beyond—stress the importance of perceived fairness and legitimacy in causing people to obey the law. It is true that the law must use deterrence and raw force from time to time, but as a general matter a “beatings will continue until morale improves” approach is virtually never the right governing principle to restore order to urban environments.<sup>8</sup> It was certainly not the right approach in Ferguson.

6. TOM R. TYLER, *WHY DO PEOPLE OBEY THE LAW* (1990).

7. *E.g.*, HUN J. HUO & TOM R. TYLER, HOW DIFFERENT ETHNIC GROUPS REACT TO LEGAL AUTHORITY (2000); Tom R. Tyler, *Trust and Law Abidingness*, 81 B.U. L. REV. 361 (2001).

8. *See* TYLER, *WHY DO PEOPLE OBEY THE LAW* *supra* note 6, at 178 (“People obey the law because they believe it is proper to do so, they react to their experiences by evaluating their justice or injustice, and in evaluating the justice of their experiences they consider factors unrelated to outcome, such as whether they have had a chance to state their case and been treated with dignity and respect. . . . This image differs strikingly from that of the self-interest models which dominate current thinking in law, psychology, political science, sociology, and organizational theory . . .”).

Stuntz's posthumous magnum opus<sup>9</sup>—not to mention countless other books and articles<sup>10</sup>—shows how many reasons the black communities have to distrust the criminal justice system. The Ferguson Report confirms these complaints. The Ferguson Report notes that many African-American citizens in Ferguson are wrongly arrested for mere “contempt of cop.”<sup>11</sup> First Amendment considerations in these arrests aside, the black community has a lot to be contemptuous *about*. As Stuntz remarks, it is amazing that the police are held in as high an esteem as they are by African-American citizens, given how poorly blacks are treated by the criminal justice system. “Given the sheer size of black incarceration over the past forty years, the *absence* of bad feeling toward the justice system would be more remarkable than its presence.”<sup>12</sup>

While Darren Wilson's use of force was justified according to the most credible witnesses and the forensic testimony, the black community refused to accept those witnesses, instead crediting rumors—thoroughly debunked in the Brown Report—that Brown was either running away, had his hands in the air, or was otherwise no threat to Wilson. In fact, the physical evidence confirmed Wilson's account: that Brown was attacking Wilson in Wilson's car, attempting to get Wilson's gun at the time Brown was first shot, and that Brown was charging Wilson when Brown was later shot again several times and killed. Close to half of the report—from pages 44 to 78—debunk the details of 24 individual witnesses “whose accounts do not support a prosecution due to materially inconsistent prior statements or inconsistencies with the physical and forensic evidence.”<sup>13</sup>

The willingness of the citizens of Ferguson to give, and believe, accounts that portray their police in the worst possible light is quite striking indeed. The report explains over and over—and over and over—that witnesses gave demonstrably false, inconsistent, or otherwise unreliable accounts:

- Witness 101's account had “material parts . . . inconsistent with the physical and forensic evidence, internally inconsistent from one part of his account to the next, and inconsistent with other credible witness accounts that are corroborated by physical evidence.”<sup>14</sup>
- Witness 123 was “inconsistent with the physical and forensic evidence.”<sup>15</sup>

9. STUNTZ, CACJ, *supra* note 4.

10. I cannot attempt any sort of canvass, but would be remiss not to mention MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS* (2010); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997); and Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13 (1998).

11. FERGUSON REPORT, *supra* note 2, at 25-26.

12. STUNTZ, CACJ, *supra* note 4, at 294.

13. BROWN REPORT, *supra* note 1, at 44.

14. *Id.* at 47.

15. *Id.* at 48.

- Witness 133's account was influenced by "watching the news [in which] 'hands up' had become the 'mantra' of the protesters."<sup>16</sup>
- Witness 119 "admitted that he gave a false account."<sup>17</sup>
- Witness 125 "admitted that she gave false accounts."<sup>18</sup>
- Witness 131's accounts were "inconsistent with each other, and his most recent version . . . inconsistent with the physical and forensic evidence."<sup>19</sup>
- Witness 112's accounts were "inconsistent as to whether Brown held his hands up in surrender," switching from yes to no.<sup>20</sup>
- Witness 135's account was "inconsistent with the forensic and physical evidence and inconsistent with other credible witness accounts" and she was "admittedly . . . unsure of what she saw, both because she was distracted and because she has poor vision."<sup>21</sup>
- Witness 124 left investigators unable to "determine what she actually witnessed as opposed to what she may have heard from others."<sup>22</sup>
- Witness 127's account was "contrary to the forensic and physical evidence and inconsistent with credible witness accounts."<sup>23</sup>
- Witness 118's account was "riddled with internal inconsistencies, inconsistencies with the physical and forensic evidence, and inconsistencies with credible witness accounts," and was from a witness whose "attention was admittedly diverted away from the shooting" and whose "account was also based on assumption and media coverage."<sup>24</sup>
- Witness 122's accounts were "irreconcilable with the physical and forensic evidence" and also "inconsistent with each other and inconsistent with credible witness accounts."<sup>25</sup>
- Witness 130's accounts were "inconsistent with each other, inconsistent with the physical and forensic evidence, and inconsistent with credible witness accounts."<sup>26</sup>

16. *Id.* at 49.

17. *Id.* at 50.

18. *Id.* at 51.

19. *Id.* at 51.

20. *Id.* at 53.

21. *Id.* at 54.

22. *Id.* at 55.

23. *Id.* at 56.

24. *Id.* at 58.

25. *Id.* at 59.

26. *Id.* at 60.

- Witness 142 “changed his account and could offer no explanation as to why he did so,” and his “most recent account is inconsistent with credible witness accounts and inconsistent with forensic and physical evidence.”<sup>27</sup>
- Witness 138’s accounts had “significant inconsistencies between his two accounts, with the physical and forensic evidence, and with credible witness accounts.”<sup>28</sup>
- Witness 132 gave an account “starkly inconsistent with what he initially told law enforcement . . . inconsistent with forensic and physical evidence, and . . . inconsistent with credible witness accounts.”<sup>29</sup>
- Witness 121 “admittedly made false statements during her initial interview,” “demonstrated bias in favor of Brown’s family” and gave accounts “inconsistent with each other, inconsistent with the physical and forensic evidence, [and] inconsistent with credible accounts.”<sup>30</sup>
- Witness 126 was “admittedly untruthful to the FBI, suffers from memory loss, and provided internally inconsistent accounts that are also inconsistent with the physical and forensic evidence and credible witness accounts.”<sup>31</sup>
- Witness 137 was “untruthful to the FBI during his initial interview, and untruthful in his media accounts” and “unable to offer a credible explanation as to why he was not truthful at the outset, leaving federal prosecutors to question what, if anything, he actually did witness” and also offered accounts “inconsistent with each other, inconsistent with the physical and forensic evidence, and inconsistent with credible witness accounts.”<sup>32</sup>
- Witness 128’s accounts were “inconsistent with each other, inconsistent with the forensic and physical evidence, and inconsistent with credible witness accounts.”<sup>33</sup>
- Witness 140’s account had “large parts . . . admittedly fabricated from media accounts.”<sup>34</sup>
- Witness 139’s account was “incoherent and inconsistent throughout, markedly inconsistent with the physical and forensic evidence, and inconsistent with credible witness accounts.”<sup>35</sup>

27. *Id.* at 62.

28. *Id.* at 63.

29. *Id.* at 64.

30. *Id.* at 66.

31. *Id.* at 67.

32. *Id.* at 68.

33. *Id.* at 70.

34. *Id.* at 72.

35. *Id.* at 74.

- Witness 120's accounts were "riddled with inconsistencies with each other, the physical and forensic evidence, and credible witness accounts" and "driven by apparent bias for his friend."<sup>36</sup>
- Witness 148's account was "inconsistent with the physical and forensic evidence [and] undisputed facts" and "inherently unreliable"; she "admittedly did not see portions of the incident based on her vantage point" and "did not report what she witnessed for nearly seven months without any reasonable explanation for the delay, giving her ample opportunity to research the facts in the form of media stories and county grand jury transcripts" and "told federal prosecutors at the outset of her interview that she 'didn't trust police at all.'"<sup>37</sup>

How could so many people give incorrect accounts, and how could those accounts be so readily believed by those engaging in violent protests? I am not competent to survey the psychological pathways by which unconscious bias may have distorted perceptions or memory, or by which conscious hostility may have motivated fabrication. Even in the absence of a sophisticated psychological account, however, it is worth considering whether one ingredient in such widespread acceptance of misinformation by the public was Ferguson citizens' reasonable mistrust of their police force. Witness 148 was surely not the only one with police-trust issues, but only the most candid. Investigators also found many other "purported witnesses [who] upon being interviewed by law enforcement, acknowledged that they did not actually witness the shooting, but rather repeated what others told them in the immediate aftermath of the shooting."<sup>38</sup> Rumors about the shooting obviously spread very quickly; the hands-up-don't-shoot meme interpreting the event quickly took hold. But it could take hold only in a soil of mistrust created by the policies described in the Ferguson Report.

The reverse-broken-windows theory suggests that in the most important contexts of police credibility, such as the Brown shooting, officers and the entire criminal justice system depend on a reservoir of credibility so that the citizenry will remain calm and not believe the worst about its public servants. The Ferguson police department, however, wasted that credibility in its stop-and-frisk practices, policies on manner of arrest, and the like.

Besides officer credibility in the eyes of the public, officers' own self-control and law-abiding attitudes can be worn down in small-stakes contexts. The normal broken-windows thesis has force when applied to officers as well: Officers who feel they can get away with unnecessarily harsh conduct or unjustifiably racially disparate patterns are more likely to feel they can get away with violating more serious norms. Walter Scott's possible murder by a North Charleston police officer may be an example.

36. *Id.* at 75.

37. *Id.* at 77.

38. *Id.* at 77.

Because police credibility is essential to the performance of their jobs, it is a grave mistake to analyze instances of police misconduct in one-dimensional zero-sum terms, as if the only issues are how aggressive we want police to be, or how much we value victims of crime versus criminal suspects. It is not. A zero-sum background assumption will make us read the Ferguson Report as simply an anti-police document that seeks only to make police less aggressive—to make them more concerned with the rights of those they investigate, relative to their concern with the rights of crime victims—and read the Brown Report as merely a balancing pro-police document. But such a zero-sum picture is grossly misleading. Zero-sum thinking will make us miss the opportunity to see how the pattern of police behavior explained in one report might help explain the false reports documented in such detail in the other.

An unfortunate instance of such a one-dimensional approach to the issues of Ferguson appears in Heather Mac Donald's commentary in *The Wall Street Journal* on the "Ferguson effect."<sup>39</sup> Mac Donald sees reports like the Ferguson Report as part of an "incessant drumbeat against the police" and associates "hostility to the police" with a deadly decrease in "officer morale."<sup>40</sup> A follow-up piece<sup>41</sup> blamed "antipolice agitation dedicated to the proposition that bias infects policing in predominantly black communities," leading police to be "increasingly reluctant to investigate suspicious behavior."<sup>42</sup>

Mac Donald is right about one thing: It is indeed very important for our police to be energetic about investigating genuinely suspicious behavior. We should not be "antipolice." Like Stuntz—and many others, including our editor Robin West<sup>43</sup>—I have written in favor of a constitutional right to police protection under the Equal Protection Clause; I favor it normatively as well.<sup>44</sup> Crime victims have a constitutional and moral right to be protected, and protected equally, by the police. To the extent she sees the importance of concern for crime victims, Mac Donald gets this right. But realizing the extreme importance of *policing* does not mean shielding police from any and all critical scrutiny. Stuntz's work, similarly insisting on the literal meaning of the equal "protection of the laws" (*i.e.*, protection from violence, and the right to

39. Heather Mac Donald, Opinion, *The New Nationwide Crime Wave: The Consequences of the 'Ferguson Effect' Are Already Appearing: The Main Victims of Growing Violence Will Be the Inner-City Poor*, WALL ST. J. (May 29, 2015), <http://www.wsj.com/articles/the-new-nationwide-crime-wave-1432938425>.

40. *Id.*

41. Heather Mac Donald, Opinion, *Explaining Away the New Crime Wave: Activists Continue to Deny the Importance of Proactive Community Policing, Even as Shootings Increase*, WALL ST. J. (June 14, 2015), <http://www.wsj.com/articles/explaining-away-the-new-crime-wave-1434319888>.

42. *Id.*

43. ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994).

44. See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1 (2008) [hereinafter EP1]; Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219 (2009). For a long list of others, see EP1, *supra*, at 5-9 & nn.19-39.



a remedy<sup>45</sup>) even as he subjects the criminal justice system to thoroughgoing criticism, likewise shows how a concern for the value of policing and criticism of those who supply it go together.

It is important, then, to attend to the nuance that Mac Donald ignores. Properly understood, the Ferguson Report is a call for *better* policing, not simply *less*. It is also, however, critical to see the pitfall she anticipates. In practice, the easiest way to deal with the criticisms, particularly in places like Ferguson where budgetary considerations loom so large, is simply to require the police to be less aggressive, or less numerous, or both. Both those who demand changes in police policies and those who respond to such demands should beware of this pitfall.

### 3. Criminal Procedure: The Need for More Manner-of-Arrest Law

Pages 28 to 41 of the Ferguson Report go into great detail on an issue Stuntz stressed many times: the *method* of conducting stops and arrests, as well as the decision to conduct one itself. Stuntz complained repeatedly that the law had so much more to say about the stop/arrest decision itself, but so little to say about the method:

For every reported decision discussing the law of deadly force, dozens discuss the rules that govern automobile searches. And amazingly, there is virtually no case law governing the use of *non*-deadly force. No one knows what the Fourth Amendment requires before an officer strikes a suspect because courts do not discuss the issue—they are too busy discussing the terms under which officers can open paper bags found in cars.<sup>46</sup>

The lack of significant method-of-arrest law is striking in light of the relative importance of fairness in police methods for maintaining, or eroding, perceived police legitimacy and hence law-abidingness. Following Tyler and Huo's work, Stuntz notes that the manner of police in individual encounters can be more important than their raw numbers, because individuals can see it easily, while they may not know how frequently the police interact with other citizens:

[I]t is the manner of the stop—the degree of disrespect and force the officers display—that largely determines how the suspect will react: with mild embarrassment, or with rage. . . . [I]ndividuals' responses to law enforcers depend not on the outcomes of their encounters but on whether the individuals thought they were treated fairly—with “fairness” captured by a trio of factors Tyler labels neutrality, benevolence, and status recognition. . . . [T]his process-based response explains why blacks and Latinos are more

45. STUNTZ, CACJ, *supra* note 4, at 99-128.

46. William J. Stuntz, *Privacy's Problem*, 93 MICH. L. REV. 1016, 1043-44 (1995). *See also, e.g.*, William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 446 (1995) (“[T]he case law on the use of non-deadly force is close to nonexistent.” (emphasis omitted) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989))). Sure enough, the Ferguson Report cites only *Graham* from the Supreme Court. FERGUSON REPORT, *supra* note 2, at 28.

dissatisfied than whites with their treatment by the police; it also explains why the first two groups are likely to be less compliant in encounters with police than the third. Importantly, both dissatisfaction and noncompliance persist despite nearly identical perceptions about outcomes in police encounters among the three groups. . . . If street stops were carried out more politely, if suspects were treated with more dignity, the level of suspect compliance with the police would rise. That would presumably mean more consensual searches—a boon for the police. It might also mean a rise in police safety: Tyler notes a sizeable body of social science research that suggests that the risk of violence rises with the level of police aggression. If Tyler’s claims are even partly true, the police could simultaneously increase the number of *Terry* stops, decrease the injury those stops cause, and substantially reduce complaints of police discrimination—all without changing the way they select search targets. If *that* is true, the law clearly has its grip on the wrong lever. Worrying about how street stops happen makes more sense than worrying about how many of them happen.<sup>47</sup>

The Ferguson Report’s extensive details about discrimination in methods of arrest, combined with the evident lack of credibility and perceived legitimacy of Ferguson’s police among its citizenry, supply more distressing data points in favor of the Tyler-Huo-Stuntz diagnosis of citizens’ interactions with police.

#### **4. State Constitutional and Administrative Law: The Scarcity of Information, Lack of Judicial Scrutiny, and the Range of Possible Responses**

The Brown Report was one of the most thorough reviews of a grand jury’s non-indictment decisions ever. Decisions *not* to enforce the law—whether made by police, or by prosecutors, or by grand juries—are the lowest-visibility decisions in the criminal justice system. But they are among the most important. Despite all the damning information the Ferguson Report did uncover, even that report was hampered at many key points by the lack of information about non-enforcement.<sup>48</sup> We cannot know the full extent of racial disparity in the criminal justice system without knowing how much crime, or apparent crime, the police do *not* investigate. And such information is, by its nature, not collected.

One way to encourage systematic reform would be more judicial scrutiny of administrative regularity at the instigation of individual litigants. Precedents denying standing for crime victims to challenge the non-enforcement of the

47. William J. Stuntz, *Policing After the Terror*, 111 YALE L.J. 2137, 2173-74 (2002) (citing Tyler, *Trust and Law Abidingness*, *supra* note 7, and TYLER & HUO, *supra* note 7). *See also* STUNTZ, CACJ, *supra* note 4, at 292 (“On city streets, ‘shock and awe’ generates shock and anger, plus sympathy for the young men the police are targeting.”).

48. *See, e.g.*, FERGUSON REPORT, *supra* note 2, at 39-40 (noting lack of use-of-force reports and investigations); *id.* at 45 (lack of transparency in court procedures); *id.* at 59 (unclear bond procedures); *id.* at 64 (incomplete information on traffic stops); *id.* at 67 (lack of information on reasons for arrest).

criminal law,<sup>49</sup> providing no remedy for victim-side disparity in the death penalty,<sup>50</sup> allowing no scrutiny for non-prosecution decisions,<sup>51</sup> typically giving no remedy<sup>52</sup> or discovery<sup>53</sup> for selective prosecutions, and finding no Fourth Amendment problem with pretextual stops<sup>54</sup> could be re-examined on such grounds. Stuntz offers one reform proposal: a general requirement that prosecutors show that their charging decisions and sentences (and the underlying policing that underlies those prosecutions) fit a general pattern of enforcement against similarly situated defendants:

Courts should entertain claims that criminal sentences for defendants belonging to different racial and ethnic groups differ, even when the crimes charged are similar. . . . For all sentences of incarceration above some minimal level—say three or six months—prosecutors should be required to show that sentences at least as severe have been imposed some minimum number of times for the same crime in the same state on similar facts. . . . When a given sentence for a given crime is . . . imposed less than systematically, its imposition should be deemed a violation of equal protection: different laws are being applied to similarly situated offenders.<sup>55</sup>

Greater equal-protection remedies for individuals, however, can go only so far under current doctrine. Even if, as the Ferguson Report plausibly concludes, racial stop-and-frisk disparity combined with the opposite disparity in actual discovery of contraband is “unexplainable on grounds other than race and evidence that racial bias, whether implicit or explicit, has shaped law enforcement conduct,”<sup>56</sup> that is not enough to show an *individual* constitutional violation. Even if there is evidence that the Ferguson Department *as a whole* has behaved unconstitutionally over the range of its activities, without more we cannot infer the presence of unconstitutional racial motivation in a particular case.

One answer would be to give individuals greater standing to assert the rights of similarly situated fellow subjects of the criminal justice system, modifying rules like *McCleskey v. Kemp*<sup>57</sup> and *Los Angeles v. Lyons*.<sup>58</sup> But even if these changes could be justified and implemented, significant improvement in the criminal

49. *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

50. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

51. *Inmates of Attica v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973).

52. *United States v. Wayte*, 470 U.S. 598 (1985).

53. *United States v. Armstrong*, 517 U.S. 456 (1996).

54. *Whren v. United States*, 517 U.S. 806 (1996).

55. STUNTZ, CACJ, *supra* note 4, at 297-98.

56. FERGUSON REPORT, *supra* note 2, at 71.

57. *See supra* note 46 and accompanying text.

58. 461 U.S. 95 (1983) (finding no standing to pursue anti-chokehold injunction without personal likelihood of future arrest).

justice system requires policymakers who *themselves* see the need for improved transparency and greater structural safeguards of fairness. Attorney General Holder said in releasing the report that he hoped it would spur the Ferguson Police Department itself to adopt policies and safeguards, and his department has sought similar reforms in other cities.

State constitutions and administrative law are essential tools as well. Stuntz's proposal for prosecutorial regularity among similarly situated defendants need not be imposed by the federal government or by courts—it could be adopted by an individual prosecutor's office, or by a state legislature, or by an attorney general acting to protect the legitimacy of those who act in the name of the state.

Ferguson illustrates the crying need for more administrative regularity in the criminal justice system. If nothing else, an *Overton Park*-style requirement of reasoned decision-making by police and prosecutors can be imposed by state decision-makers.<sup>59</sup> State attorneys general generally possess great supervisory power under state constitutions over state criminal justice systems.<sup>60</sup> They should utilize it. Information is, of course, not cost-free, but maintaining a legitimate criminal justice system cannot be done cost-effectively in the dark. It should not take crises like Ferguson or other distressingly common instances of police misbehavior to make voters, taxpayers, and representatives see the need for information about how the criminal justice system distributes its investigative and protective resources.

## 5. Conclusion

I have no simple solution to the budgetary concerns that drove Ferguson's misplaced priorities in the first place. The municipal history of the St. Louis area is complicated.<sup>61</sup> Greater attention to these issues among law students will not, moreover, magically produce money to fund the sorts of internal investigations that greater administrative regularity would require. Money taken out of scarce

59. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (requiring “adequate explanation” of agency action under arbitrary-and-capricious-or-abuse-of-discretion APA review).

60. See, e.g., CAL. CONST. art. V, § 13 (stating that the Attorney General is the “chief law officer of the State” with a duty “to see that the laws of the State are uniformly and adequately enforced,” who shall “direct supervision over every district attorney and sheriff,” and has the power to “require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions,” and to prosecute if “any law of the State is not being adequately enforced in any county”); 7 AM. JUR. 2d *Attorney General* § 6 (2015) (“[A]n attorney general may not only control and manage all litigation in behalf of the state, but he may also intervene in all suits or proceedings which are of concern to the general public.”); Note, *The Common Law Power of State Attorneys General to Supersede Local Prosecutors*, 60 YALE L.J. 559, 560 (1951) (noting demand for more “uniform enforcement of state laws” through greater attorney general control).

Rachel Barkow is one of the few scholars to address the division of authority between district attorneys and attorneys general. See Rachel Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519 (2011).

61. See, e.g., JEFF SMITH, *FERGUSON IN BLACK AND WHITE* (2014).

police or municipal budgets to fund more self-consciously equitable policing might be seen as a threat to the provision of adequate protective services. If Tyler, Huo, and Stuntz's interpretation of the sociological preconditions for law-abiding behavior is right, however—and the juxtaposition of the Brown and Ferguson reports suggests that it is—we must see racial equity not as the competitor of the adequate provision of police services, but its prerequisite. Put another way, acknowledging the reverse-broken-windows explanation of the importance of small-level police misbehavior can reinforce, rather than undermine, the traditional broken-windows thesis about the importance of small-level disorder among the citizenry. Cleaning up municipal police forces and cleaning up our cities should not be put at odds with each other. Protecting citizens and respecting them should go hand in hand.