

Moral Shock and Legal Education

Susan A. Bandes

The concept of “moral shock” describes the sense of outrage that occurs when an event or newly acquired information shows that the world is not what one had expected.¹ Moral shock combines the cognitive, moral, and emotional realms. It includes “a visceral, bodily feeling, on a par with vertigo or nausea. The prospect of unexpected and sudden changes in one’s surroundings can arouse feelings of dread and anger.”² Dread can paralyze. Anger, on the other hand, can be “transformed into moral indignation and outrage toward concrete policies and decision makers,”³ and toward a rethinking of one’s moral principles.

For my criminal procedure students, as for much of the nation, the events collectively known as “Ferguson,”⁴ as well as the dashcam and bodycam and cellphone videos of police encounters with unarmed motorists turning deadly, have evoked a powerful moral shock. Moral shock can be transient or transformative. What is my role in transforming the moral shock generated by Ferguson into something of lasting value?

The day after the Ferguson grand jury declined to indict was a rare kind of teaching day. We want our students to be open to new information, eager to gain knowledge, passionate about what they learn. On that day my students came to class not just open but vulnerable and in pain, not just curious but needing answers. They were desperate to understand how this sort of injustice could occur, and what could be done to fix it. They were desperate to be reassured that law matters. I have occasionally experienced such teaching days, when it felt as if the students were teetering on the edge of an abyss. We were far enough into the term to have discussed countless divergences between the law on the books and the law in the streets, and we had often

Susan A. Bandes is the Centennial Distinguished Professor at DePaul University College of Law.

1. James M. Jasper, *Emotions and Social Movements: Twenty Years of Theory and Research*, 37 ANN. REV. SOC. 285, 289 (2011).
2. Jeff Goodwin, James M. Jasper & Francesca Polleta, *Why Emotions Matter*, in *PASSIONATE POLITICS: EMOTIONS AND SOCIAL MOVEMENTS* 26 (Jeff Goodwin, James M. Jasper & Francesca Polleta eds., 2001).
3. *Id.*
4. Including, but not limited to, the killing of Michael Brown, the grand jury decision not to indict Darren Wilson, and the scathing Department of Justice report on the Ferguson criminal justice system.

considered the inevitable question: “Why should we study these rules if it is so easy for the police to get around them or ignore them?” But this felt different.

Some days it is difficult to convey the malleability and indeterminacy of legal rules. Some days it is difficult to convince students that law is more than just a series of doctrinal rules they can simply memorize. On that day, it was not difficult to move away from the strictures of doctrine—instead, it was difficult to convince my students that law matters at all. What my students felt was outrage and raw pain. I saw my job that day as finding a way to acknowledge and honor those feelings without rushing to shape them into doctrinal critiques.

As *The New York Times* summarized it, “Raw video has thoroughly shaken American policing . . . [leading to] nationwide protests, federal investigations and changes in policy and attitudes on race.”⁵ The shock that these videos elicit is not universally shared. As Paul Butler observed, “A lot of white people are truly shocked by what these videos depict; I know very few African-Americans who are surprised.”⁶ It is precisely this chasm that makes the videos such a crucial addition to the national conversation on policing. For many, these videos are new information. They contradict official stories that have long gone unchallenged. One pernicious characteristic of this type of police misconduct and brutality—the one that has permitted it to flourish virtually unchecked—is precisely that so many people of means, power, and influence will never experience it⁷ and, therefore, will dismiss it as improbable, anecdotal, or even somehow deserved.⁸

There are powerful barriers to communicating this information. One barrier is simply that the official version was long the only version communicated to the public, and alternative versions were suppressed, belittled, and dismissed. Another barrier is that even when accurate information is available, there is a relentless drive to portray each death as an isolated incident by a lone, rogue official—and moreover as an incident that would have been avoided if only the decedent had “followed the law.”⁹ This dynamic has been all too evident as the circumstances of the deaths of Eric Garner and Tamir Rice and

5. Damien Cave & Rochelle Oliver, *The Videos that Are Putting Race and Policing into Sharp Relief*, N.Y. TIMES (July 30, 2015, updated Aug. 12, 2015), <http://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html>.

6. *Id.*

7. And that subset of people who are unlikely to experience this type of police-citizen encounter includes most Justices on our current Supreme Court. See Cristian Farias, *The Chief Justice Has Never Been Pulled Over in His Life*, SLATE (Feb. 11, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/02/chief_justice_john_roberts_has_never_been_pulled_over_rodriguez_v_united.html.

8. See generally Susan A. Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275 (1999).

9. See, e.g., Andrew Kirell, *9 Cable News Pundits Who Blame Eric Garner for His Death*, MEDIAITE (Dec. 5, 2014, 11:48 AM) <http://www.mediaite.com/tv/9-cable-news-pundits-who-blame-eric-garner-for-his-death/>.

Walter Scott and Freddie Gray and Sandra Bland and Samuel DuBose and so many others have come to light. In each case, even in the face of contrary evidence, efforts were made to portray these encounters as the products of rogue cops and blameworthy victims. Such narratives have long been readily accepted, and not only because the “rotten apple” narrative is self-protective for police departments and other official entities. Their power also derives from a deeply rooted desire to believe that the world is just¹⁰ and that the police are upstanding,¹¹ and that it is in our control to avoid fates like Bland’s and DuBose’s as long as we follow the rules.

Barriers aside, much of this information has been available for a long time, and the power of the Darren Wilson verdict and the videos cannot be explained entirely as the function of new information. I, like many of my colleagues who teach criminal procedure, have talked to my students for years about the problems of pretextual stops, the disparate impact of stop-and-frisk on minority communities, and many of the other issues raised by police-citizen encounters. But there has always been the question of how to make these issues visceral—how to evoke the moral shock they deserve. The videos have an impact that simply cannot be elicited by words.¹²

For many years I told my criminal procedure students that their attitudes toward the doctrines constraining the police power would depend on whether they believed that the police power would ever be misused against them or those they care about. This was meant as a call to summon a certain kind of empathy—the understanding that abuse of police power is not something that happens only to some “criminal class” that exists far from our realm of concern. But as I began studying police brutality in the late 1990s, in the wake of the Abner Louima and Amadou Diallo cases and the Chicago police torture scandal, I began to understand that empathy based on the likelihood of shared experience would not be sufficient. It is important to convey that police intrusion cannot be avoided simply by avoiding criminal behavior, and that “criminal behavior” is a capacious and unstable category that does not merely encompass violent felonies. But that is not enough. It is also essential to communicate that, for many students, extrapolating from their own experience and the experiences of their friends and family members leads to a very skewed notion of policing—one that ignores what is essentially a separate system of policing for minority communities.

The looming question, in short, is how to make visceral an experience that is alien to the lives of many law students. It is not enough to talk about drug testing, roadblocks, airport searches, run-of-the-mill traffic citations, and the

10. See ERWIN STAUB, *THE ROOTS OF EVIL: THE ORIGINS OF GENOCIDE AND OTHER GROUP VIOLENCE* 79 (1989); Bandes, *supra* note 8, at 1319.

11. Bandes, *supra* note 8, at 1332-33.

12. The issue of how and what videos communicate—their power, their ability to make information vivid, their authority (whether earned or unearned)—is a complex and fascinating topic in its own right. See Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003 (2014).

other sorts of police actions that most frequently intersect with the lives of privileged, non-minority students. Such examples fail to convey the terror and intensity of experiencing the sorts of demeaning, escalating, violent traffic stops these videos document. They fail to convey the experience of living in pervasive fear of being stopped; the urgent need to teach one's children at an early age how to behave during a police encounter; the awareness that a seemingly innocuous encounter can quickly turn deadly.

For years I cited statistics. I showed films about Driving While Black. I encouraged students to tell their own stories. Some of these stories were the most effective teaching tool I had—students gut-punched with the realization that unwarranted police brutality could be visited on their own friends, classmates and colleagues, or members of their classmates' families.¹³ And finally, we have gained access to the videos—the cellphone videos, the dashcam and bodycam videos—what Paul Butler calls “the C-SPAN of the streets.”¹⁴ Not only do they contradict the official story time and time again; they open a vivid window onto what is, for many, an entirely separate reality.

The fall semester of 2014 began in late August, a few weeks after Darren Wilson killed Michael Brown. Then in late September, just over the border from Chicago in Hammond, Indiana, police pulled over a car containing an African-American family, and ticketed the driver for failure to wear a seat belt. They then, for no discernible reason and with no legal justification, demanded identification from the driver's husband, Jamal Jones, who was sitting in the passenger seat. The encounter quickly escalated as the police pulled a gun, the terrified passenger refused to exit the car, and the officer broke the window, tased him, and pulled him out of the car through the window. The couple's fourteen-year-old son in the back seat filmed the encounter on his cellphone as shattered glass filled the passenger compartment and he and his seven-year-old sister screamed in terror. In early October, the couple filed suit, and a video of the encounter was released. In horror, we watched the video in class. We discussed the civil suit filed by the family and the pending FBI investigation. On November 24th, we heard that the FBI investigation had been closed.¹⁵

13. After one such incident, a white student transformed overnight from the disengaged young man at the back of the classroom into a firebrand determined to litigate police brutality cases, after his brief foray into Overtown, Miami (a low-income, predominantly black neighborhood), to pick up a change of clothes for an African-American friend led to the appearance of five police cars and a complete search of his car at gunpoint—a car which contained no contraband. The day after the encounter, the student asked to address the class. As he communicated to us quite powerfully, he had come to understand viscerally the limits of the exclusionary rule as a remedy for Fourth Amendment violations.
14. *Police Video, "C-Span Of The Streets," Seen Eroding Confidence In Officers*, CRIME REP. (July 31, 2015, 9:27 AM), <http://www.thecrimereport.org/news/crime-and-justice-news/2015-07-police-video-feature-nyt>.
15. This was soon revealed to be an erroneous statement by the mayor of Hammond, who subsequently issued a correction, stating that the federal investigation is ongoing. Charlie Wojciechowski, *Mayor: FBI Still Investigating Hammond Stun Gun Case*, NBC CHICAGO (Oct. 7, 2014), <http://www.nbcchicago.com/news/local/hammond-police-lawsuit-283838961.html>. Nevertheless, the officers involved were swiftly reinstated. Ben Mathis-Lilley, *Police Who*

The following day, the grand jury decision in the Darren Wilson case was announced. My class met shortly after we learned that no indictment would issue. Their reactions included confusion, a sense of betrayal, and outrage.

We had a useful discussion about the ways in which prosecutor Robert P. McCulloch's approach in Wilson's case was unusual, how it deviated from the norm. We discussed his decision to bombard the grand jury with information while withholding his own guidance on which information was important; his failure to intervene or weigh in despite the presentation of testimony he regarded as false; his failure to ask the grand jury to indict. We discussed and critiqued the rules, we discussed the political pressures, we discussed the origins and purposes of the grand jury, and we discussed bias—conscious and unconscious. This was productive. Students are often resistant to the notion of indeterminacy; they are not always open to the idea that historical and political and social context shape law. That day these explanations made sense, and helped address the need to make sense of what had occurred. But as I conducted this discussion, I thought uneasily about the way lawless actions and decisions become normalized—about the way it all becomes part of the same doctrinal conversation. I thought of Elizabeth Mertz's ethnographic study of the first year of law school, in which she describes an inexorable pressure in the classroom toward the normalization of narrow, legalistic evaluations of disputes, and away from the use of moral and social frameworks.¹⁶

It goes without saying that we need to help our students learn how to read closely and articulate and defend their arguments and place doctrine in larger theoretical, social, and political contexts. But it is less often observed that we play an important role in modeling and channeling the ways in which our students express and manage their emotions—emotions that are closely intertwined with moral intuitions and moral reasoning. Often the default reaction is to tamp down strong emotions or shift students to a purely cognitive realm, but there are serious risks to this approach.¹⁷

As I write this essay, we are in the midst of trying to piece together how a young African-American woman named Sandra Bland died in a Texas jail

Shattered Window, Tased Passenger in Viral Traffic-Stop Video Were Reinstated, SLATE (Dec. 8, 2014, 11:48 AM), http://www.slate.com/blogs/the_slatest/2014/12/08/seat_belt_taser_police_reinstated_hammond_indiana_police_back_on_job.html; Michael Puente, *Disbelief by Some in Hammond After Accused Cops Are Reinstated*, WBEZ 91.5 (Nov. 25, 2014, 4:00 PM), <http://www.wbez.org/news/disbelief-some-hammond-after-accused-cops-are-reinstated-111159>.

16. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* (2007). See also Mark Tushnet, *Renormalizing Bush v. Gore: An Anticipatory Intellectual History*, 90 GEO. L.J. 113 (2001), which correctly predicted that the lawless decision in *Bush v. Gore* would eventually become normalized in accord with the conventions of legal discourse.
17. See generally 3 MORAL PSYCHOLOGY: THE NEUROSCIENCE OF MORALITY: EMOTION, BRAIN DISORDERS, AND DEVELOPMENT (Walter Sinnott-Armstrong ed., 2007) on the central role emotions play in moral appraisals, and in social cognition more generally. See also Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339, 386 (2006) (discussing the dangers of placing nearly exclusive emphasis on the intellectual aspects of legal issues at the expense of morality, ethics, and character).

three days after being pulled over for failing to signal a lane change.¹⁸ It is summer, and class has not yet begun. I think about how we might dissect this traffic stop in my criminal procedure class. We would talk about the litany of case law that breaks down a traffic stop into so many component parts: the fact that failure to signal a lane change actually does provide probable cause for a stop and that there is no constitutional bar to converting a simple traffic stop for failure to signal into a full-blown custodial arrest¹⁹; the fact that even if the officer is wrong about the legality of the stop, his mistake of law may be excused if it is “reasonable”²⁰; the fact that, assuming the stop is still in progress, probable cause also allows the officer to order the driver (or even the passenger) to step out of the car, regardless of whether there is any good reason for such an order.²¹ We could debate whether the stop was still in progress when Sandra Bland refused to extinguish her cigarette and then refused to exit the car.²² We could talk about the Supreme Court’s parsimonious interpretation of the concerns of the Fourth Amendment. We would certainly observe that the issue of how the motorist is treated—the lack of respect, the assault on dignity—is rarely addressed in Fourth Amendment law, and that the issue of whether the motorist’s race led to the stop or affected the nature of the stop is, according to the Supreme Court, not a Fourth Amendment issue at all.²³ We have debated and critiqued this case law time and again, and I would have said that I understood these problems fully. Nevertheless, as I write this in the immediate wake of the deaths of Samuel Dubose and Sandra Bland, the doctrinal debate feels like rearranging the deck chairs on the Titanic. At this point, the Fourth Amendment cases we dissect year after year strike me as little more than a legal veneer legitimating racially discriminatory police brutality and violence.

The foundational cases that constitutionalized criminal procedure did not acknowledge their own origins—they were responses to racial inequality and injustice but rarely mentioned race explicitly.²⁴ It is possible to teach an entire course on criminal procedure without acknowledging that we still have, today, two separate sets of rules governing police-citizen encounters. Although some aspects of this racial chasm can be conveyed through our usual doctrinal tools,

18. I am still writing as this story is joined by another—the video of Samuel DuBose shot fatally in the head by a campus cop who pulled him over because his car had no front license plate.
19. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).
20. *Heien v. North Carolina*, 135 S. Ct. 530, 532 (2014). See also Ken Armstrong, *How the Supreme Court Made It Legal for Cops to Pull You Over for Just About Anything*, MARSHALL PROJECT (Aug. 3, 2015, 11:43 AM), <https://www.themarshallproject.org/2015/08/03/how-the-supreme-court-made-it-legal-for-cops-to-pull-you-over-for-just-about-anything>.
21. *Maryland v. Wilson*, 519 U.S. 408 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).
22. Likely not, since the ticket had already been written. *Rodriguez v. United States*, 135 S. Ct. 1609, 1610 (2014).
23. *Whren v. United States*, 517 U.S. 806 (1996).
24. See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

one problem confronting criminal procedure teachers is the very scope of the field. Criminal procedure is a constitutional course that focuses mainly on individual rights and remedies. Its canon has little to say about the law as an instrument of social control. That is left to criminology and sociology.²⁵ It has little to say about the impact of policing on predominantly minority communities. Many of the remedial options that address systemic racial bias, such as Section 1983 suits under the Fourteenth Amendment or federal pattern and practice suits brought by the Department of Justice, are addressed only briefly. Although the course focuses largely on the courts, and especially the Supreme Court, most of the promising solutions to racial disparity and misconduct in policing lie outside the courtroom.²⁶

One response is to widen the curricular lens. Many of the most effective exchanges I have had with students about core legal concepts like justice, fairness and inequality have taken place in seminars and other courses that eschew casebooks and doctrinal texts. The most powerful have involved narrative texts, fiction or nonfiction.²⁷ Next spring, I will teach a criminal procedure seminar that focuses on the policing of minority communities. We will read, among others, Jill Leovy's *Ghettoside*,²⁸ Alice Goffman's *On the Run*,²⁹ Steve Bogira's *Courtroom 302*,³⁰ Claudia Rankine's *Citizen*,³¹ Michelle Alexander's *The New Jim Crow*,³² and Ta-Nehisi Coates' *Between the World and Me*,³³ as well as

25. See Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521 (1992); Eric J. Miller, *Putting the Practice into Theory*, 7 OHIO ST. J. CRIM. L. 31 (2009); Susan Bandes, *Parallel Play: The Disconnect Between Criminal Procedure and Criminology Revisited*, JOTWELL (Dec. 17, 2009), <http://crim.jotwell.com/parallel-play-the-disconnect-between-criminal-procedure-and-criminology-revisited/>.
26. To name a few: 1) strengthening police training, screening, and discipline, and the oversight of these functions; 2) requiring mandatory reporting of shootings and other uses of police force to the FBI; 3) precinct-wide tracking of misconduct and brutality incidents; 4) using early warning systems to identify officers whose behavior is problematic and to subject those officers to some kind of intervention, often in the form of counseling or training; 5) lowering barriers to discovery and dissemination of police misconduct records; 6) strengthening federal pattern and practice legislation; 7) addressing the use of arrests or warrants for revenue collection; and many more.
27. The course I consider one of my most effective is entitled Law, Literature, and Capital Punishment. It uses short stories, book chapters, novellas, poetry, memoir, law review articles, and other sources to illuminate the experience of those affected by the death penalty, including defendants, victims' families, defendants' families, judges, jurors, prosecutors and defense attorneys, wardens, chaplains, and executioners.
28. JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* (2015).
29. ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2014).
30. STEVE BOGIRA, *COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE* (2005).
31. CLAUDIA RANKINE, *CITIZEN: AN AMERICAN LYRIC* (2014).
32. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).
33. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015).

critiques and commentaries of these texts. Seminars, however, reach only a small group of students. My next step is to explore incorporating similar narratives into the core course.

Ta-Nehisi Coates talks about coming to view “the gnawing discomfort, the chaos, the intellectual vertigo” produced by his education as a “beacon” rather than an alarm. He says, “It began to strike me that the point of my education was a kind of discomfort,” that “discord, argument, chaos, perhaps even fear” were a “kind of power.”³⁴ As I stood before my students on the day we learned about the Darren Wilson grand jury verdict, I thought not for the first time that the impulse to reassure my students that we can create intellectual order out of chaos is something I do for myself as much as for them. Inaugurating my students into a world of doctrinal order, in which some doctrines have to be tweaked but the framework is sound, in which I am in possession of the answers, is reassuring for all of us. But our most powerful legal tools come from seeing things as they are, free of comforting myths.

This terrible moment is a window, an opportunity. If the term “systemic injustice” sometimes sounds abstract to my students, the “C-SPAN of the streets” has made it concrete. We are confronted with the limits of doctrine, and the limits of courts as engines of change, and the ways in which doctrine shape-shifts around an enduring status quo. The good news is that we can help our students stare into that abyss and come out stronger. It is not my job to reassure my students that law makes sense. It is not my job to allay my students’ anger. Where—as here—it is appropriate, my job is to help them nurture that anger into an abiding moral outrage, and to help them deploy their legal education to put that outrage to good use.

34. *Id.* at 52.