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Police Violence and Ferguson: (En)Racing Criminal Procedure

By Jeannine Bell

Even if I had wanted to, there is simply no way that I could have avoided discussing the events in Ferguson, Missouri, with my Criminal Procedure Investigation class and maintained any credibility with my students. When Michael Brown was shot to death by police officer Darren Wilson in August 2014 in Ferguson, Missouri, I was preparing to teach a group of first-year law students who started law school in the summer and would take my Criminal Procedure Investigation class in the fall. My course addresses citizens' rights with respect to the police as dictated by the Fourth and Fifth Amendments. Additionally, I have a longstanding interest in police behavior. Early in my career I wrote a book based on several months I spent in a police unit watching police investigate hate crime,¹ so I always tie discussion of legal doctrine to the empirical research on how police act on the ground. Finally, I am African-American; I always address issues of race and policing in the course.

Even though the issues related to Ferguson are clearly relevant to my course, I knew that raising them in class was potentially fraught. The students came from different racial and ethnic backgrounds, and had diverse perspectives on the issue. To illustrate one racial divide, polling data on trust of the police has long shown significant differences on how blacks and whites view the police and police behavior. In August 2014, Gallup released a poll that amalgamated data collected since 2011, broken down by race;² 57% of whites expressed "a great deal/or quite a lot" of trust in the police.³

For African-Americans, it was a much different picture. Just 37% of African-Americans polled by Gallup felt "a great deal or quite a lot of confidence in the

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1. JEANNINE BELL, *POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS AND HATE CRIME* (2002).
2. Frank Newport, *Gallup Review: Black and White Attitudes Toward Police*, GALLUP (Aug. 20, 2014), <http://www.gallup.com/poll/175088/gallup-review-black-white-attitudes-toward-police.aspx>.
3. *Id.*

police.”⁴ Unsurprisingly, polls after the grand jury’s refusal to indict Darren Wilson captured this divide. According to the Pew Research Center, 64% of whites surveyed believed that the grand jury’s decision not to charge Wilson was correct.⁵ By contrast, 80% of blacks surveyed felt that the grand jury’s refusal to charge Wilson was wrong.⁶

The polling data had potentially disturbing implications for class discussion. A poll by the Pew Research Center revealed that those blacks and whites surveyed shared little common ground, strongly disagreeing about fundamental issues. Among whites surveyed, 60% believed that race was not a factor in the grand jury’s decision not to charge Darren Wilson with the killing of Michael Brown.⁷ In sharp contrast, 64% of blacks believed that race was a major factor in the grand jury’s decision not to charge Wilson.⁸

Why Such Division?

As a race and policing scholar, I could see that media coverage of the protests in Ferguson ignited fierce and long-standing debate about racial privilege and discrimination. These are difficult discussions in the best of circumstances, and the events surrounding Ferguson were not the best of circumstances. The racial separateness of American society means that most of us get little practice engaging in conversations across the color line. According to analysis of the 2010 Census, the average white American city-dweller lives in a neighborhood that is 77% white.⁹ Not only are whites segregated by neighborhood, but also by their social networks, which do little to foster conversations about race with nonwhites. According to a survey by the Public Religion Institute, among white Americans, 91% of the people in their social networks are also white.¹⁰ Among black Americans, 83% of the people in their social networks are also black, while 8% are white and 6% are some other race.¹¹ Among Hispanic Americans, approximately two-thirds (64%) of the people who comprise their

4. *Id.*

5. Bruce Drake, *Ferguson Highlights Deep Divisions Between Blacks and Whites in America*, PEW RESEARCH CTR. (Nov. 26, 2014), <http://www.pewresearch.org/fact-tank/2014/11/26/ferguson-highlights-deep-divisions-between-blacks-and-whites-in-america/>.

6. *Id.*

7. *Id.*

8. *Id.*

9. See Margery Austin Turner & Zachary McDade, *Neighborhood Diversity: Immigration Brings Big Changes to Urban Neighborhoods*, METROTRENDS, www.metrotrends.org/commentary/neighborhood-diversity.cfm (last visited Sept. 5, 2015).

10. See *Analysis: Race and Americans Social Networks*, PUB. RELIGION RESEARCH INST., <http://publicreligion.org/research/2014/08/analysis-social-network/#.Vae1T-u7595> (last visited Sept. 5, 2015).

11. *Id.*

social networks are also Hispanic, while nearly 1 in 5 (19%) are white, and 9% are some other race.¹²

In my classes, different perspectives on policing were shaped by the nature of students' experiences. Over the past several years, and in my class of fall 2014, some students shared their view on Ferguson as being informed by close friends or relatives who were law enforcement officers. At the other end of the potential divide were students who have experienced discrimination at the hands of law enforcement. In the wake of the grand jury deliberations in the Michael Brown and Eric Garner cases, the rhetoric surrounding Ferguson and other police killings was explosive on both sides. Students' feelings were raw, and at various points both black and white students felt marginalized by the discussion.

Straddling the Divide, Engaging All Students

As a teacher, I resisted the temptation to hide my views and present what I characterize as the wholly objective view from nowhere. Though some may see the decision not to discuss one's own viewpoint as offering support to all sides, I see such silence differently. In my experience, the students have our number. Professors are simply not as good as they think they are at hiding their true perspectives. In addition, hiding one's views lacks the honesty and authenticity that our students deserve. Finally, in my view, when we consciously try to hide our views from our students we are saying to them, "Do not publicly stand for anything. Hide your views at work." This is particularly unfair to those students who want to have public interest careers.

Though my students may have had some idea of what I thought about these issues, my class was not a platform for my (complicated) views on race and policing.¹³ I answered doctrinal questions by presenting the views of public defenders, police, and prosecutors involved in the case. When students asked what I thought about the issues, I referred them to my writing.¹⁴ In class, I used the events in Ferguson as a charge for us to look at the smallest details of criminal procedure doctrine. When students asked whether Officer Wilson's

12. *Id.*

13. Though I was not trying to hide my views from my students by presenting the story from all of the actors involved, it may have made it harder for some to assign me to a particular "side." A white male colleague who was teaching criminal law to my section told me, "They [my students] can't pin you down. They said when they think you are going to go one way, you go in a different direction." He then (kindly) replied to the confused students, "Of course. It's *complicated*."

14. I am a police scholar, and so about police issues in general I referred my students to my books or articles on police procedure, *see, e.g.*, BELL, POLICING HATRED, *supra* note 1 (analyzing police procedure for investigating hate crimes); Jeannine Bell, *Behind this Mortal Bone: the (In) Effectiveness of Torture*, 83 IND. L. J. 339 (2008) (critiquing the practice of torture in police interrogation). For my views of Ferguson, I referred them to: Audrey T. McCluskey & Jeannine Bell, Opinion, *Police Culture Must Change to Prevent Future Fergusons*, PROVIDENCE J. (R.I.) (Sept. 15, 2014), <http://www.providencejournal.com/article/20140915/OPINION/309159884> [hereinafter *Police Culture Must Change*] (also appeared in 14 other newspapers nationwide).

shooting of Michael Brown was justified, I walked them through every legally relevant fact that we had at the time and asked them how the doctrine we had studied interprets facts in similar sorts of cases. For instance, when we discussed *Tennessee v. Garner*,¹⁵ a case in which an unarmed black teenager was shot in the back by police, students questioned whether Officer Wilson was justified in shooting Brown. We talked about the requirements for using deadly force and whether this case was or was not like *Garner*. Because students had questions about the non-indictment of Officer Wilson, we also discussed grand jury procedures in other police-action shooting cases, even though such procedures are not normally part of the course.

Students with a variety of perspectives participated in our criminal procedure discussion of Ferguson. In my view the class discussions were full and fair, involved blacks, whites, and students of other racial backgrounds. Luckily, perhaps because I prepared for it by talking about respecting one another's views, the discussion was not acrimonious. As a teacher, I always want to provide a safe environment for students from a wide variety of perspectives to exchange views. Some students may have found this space in me; others may have found it in the environment I encouraged in class.¹⁶

Ferguson Outside the Classroom

My teaching could not contain all of my work in the wake of Ferguson. As a scholar, because of the gravity of the events in Ferguson, I felt pulled to interpret the events for a variety of audiences. Though it is not something to which I am accustomed, I wrote several op-eds, two of which were published.¹⁷ I also overcame my general mistrust of the press and spoke to the media.¹⁸

15. 471 U.S. 1 (1985).

16. I had insights into what students experienced from two divergent perspectives. My most pro-police student met with me privately to express that he felt his colleagues did not respect his views. My most anti-police student raised his hand in class and commented that other students' laughter the previous day, in response to a comment critical of police, was disrespectful. Though both students were unhappy, I consider the fact that they felt comfortable enough to express their feelings as a silver lining.

17. See, e.g., Jeannine Bell, *How to Improve Discussion of Race in the Classroom*, CHRON. HIGHER EDUC. (Dec. 14, 2014), <http://chronicle.com/article/How-to-Improve-Discussion-of/150857/>; McCluskey & Bell, *Police Culture Must Change*, *supra* note 14.

18. See, e.g., Ashby Jones & Joe Palazzolo, *Law and Evidence Tilted in Ferguson Police's Favor*, WALL ST. J. (Nov. 25, 2014), <http://www.wsj.com/articles/law-and-evidence-tilted-in-ferguson-polices-favor-1416950255> (quoting Jeannine Bell). My interaction with the media generally was fine, but I had to get used to the fact that a reporter might be looking for a story that generated controversy. Several days before the grand jury decision in the Ferguson case was announced, one reporter called and asked me what was the worst-case scenario if there was not an indictment. In light of the ongoing protests in Ferguson, I replied that a non-indictment could lead to the type of rioting seen in Los Angeles in the wake of the failure to convict the police officers who beat Rodney King. I received several angry emails from individuals who read the resulting inflammatory story. See Regina F. Graham, *Expert: 'LA Riots with Rodney King is What Should Be Expected to Happen in Ferguson'*, CBS ST. LOUIS (Nov. 3, 2014), <http://stlouis.cbslocal.com/2014/11/03/>

The most productive exercise in which I engaged involved connecting the events in Ferguson to police behavior around the country. The event that reached the most people was a teach-in, “It’s Not So Black and White: Talking Race, from Ferguson to Bloomington.” More than 500 students and community members attended. The teach-in was organized by the diversity committee of IU Bloomington’s History Department.¹⁹ In part, the teach-in’s success stemmed from the financial support it received from 23 separate university units and community organizations.²⁰ I moderated the presentations of the three other African-Americans on the panel, two of whom, Akwasi Owusu-Bempah and William Jelani Cobb, were also academics. The final panelist, Valeri Haughton, is a judge of the Monroe County Circuit Court, the county that encompasses Bloomington. The event was followed by a Justice Fair at which 37 campus and community organizations provided students with volunteer opportunities.

Ferguson’s Legacy

Ferguson and the attention to police violence engendered by the killing of Michael Brown and the ensuing protests have had a lasting effect on me as both a scholar and a teacher. As a scholar, I have renewed interest in writing about the police. There is a close connection between my writing and my teaching in this regard, because I do not believe that we can teach criminal procedure in a way that is divorced from what we know about police behavior. Some may argue that the little cases on traffic stops do not matter. Ferguson reminded us that they do. As a teacher, I see Ferguson and later incidents, such as the killing of Freddie Gray in Baltimore, as reminders that the tiny details—*i.e.*, whether a stop is justified by reasonable suspicion—*matter*.²¹ In these cases we

expert-la-riots-with-rodney-king-is-what-should-be-expected-to-happen-in-ferguson/.

19. See *Several Campus Events Will Explore Topics of Race, Social Justice in America*, INSIDE IU BLOOMINGTON (Mar. 5, 2015), <http://inside.indiana.edu/features/stories/2015-03-05-not-so-black-and-white.shtml> (describing the teach-in).
20. The organizations providing financial support for the program included: African Studies Program; Asian American Studies Program; Borns Jewish Studies Program; Center for Latin American and Caribbean Studies; Center for the Study of the Middle East; City of Bloomington Community and Family Resources Department; Department of African American and American Diaspora Studies; Department of American Studies; Department of Criminal Justice; Department of History; Department of Labor Studies; Department of Political Science; Department of Sociology; Latino Studies Program; National Association for the Advancement of Colored People; School of Education; School of Public Health; South Central Indiana Jobs with Justice; Union Board; University Graduate School.
21. Take, for instance, the killing by police officers of Freddie Gray. Marilyn Mosby, the state’s attorney in Baltimore, elected to file manslaughter, murder, and other charges against six Baltimore police officers for roles in Gray’s death, based in part on the fact that there was not probable cause to support his arrest. Sheryl Gay Stolberg & Alan Blinder, *Marilyn Mosby, Prosecutor in Freddie Gray Case, Takes a Stand and Calms a Troubled City*, N.Y. TIMES (May 1, 2015), http://www.nytimes.com/2015/05/02/us/marilyn-mosby-prosecutor-in-freddie-gray-case-seen-as-tough-on-police-misconduct.html?_r=0. The precise requirements for probable cause are not something that people other than law professors expect to figure into high-profile cases.

are reminded that the Fourth Amendment is not relevant just in the unlikely event that an illegally seized item will be suppressed.

If past is prologue, then police violence against unarmed citizens will continue. In light of this pattern, I feel a continuing calling to prepare my students for lives as prosecutors and public defenders, positions in which they will routinely have to examine whether police actions are justified.