

FOUND IN TRANSLATION: THE VALUE OF TEACHING LAW AS CULTURE

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ABSTRACT

Although the study of law within its larger culture is emerging, recognition of law as culture is still generally nascent within legal studies and pre-professional programs. In fact, the greater recognition of law's social and political role may have impeded a consideration of law's role as culturally specific. Yet, as law practice becomes more globalized, such awareness is an increasingly necessary element of any practitioner's toolkit. This Article explores three examples of cross-cultural blunders to demonstrate the necessity of being sensitive to law in cultural context.

INTRODUCTION

Those outside the legal community might be surprised to learn that law students spend three years studying the abstractions of *what* the law is without ever necessarily engaging in the question of *why* the law is this way. Many U.S. law schools, for example, offer one full year of contract law without ever considering what it means for the government to enforce agreements made between private individuals and what sorts of agreements representative government might therefore be interested in enforcing. If political science and theory have often helped reify law by considering it as a uniform topic (leaving the discussion of the content of law to specialists, i.e., lawyers), lawyers have traditionally repaid the favor by closely studying the substance of law without considering its attendant impact on political science or theory.¹

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1. This observation does not hold across all social science disciplines. Sociologists, for example, have typically shown a greater willingness to consider legal content, beginning with the founder of sociology, Émile Durkheim. See, e.g., ROGER COTTERRELL, ÉMILE DURKHEIM: LAW IN A MORAL DOMAIN 44 (1999). Legal practitioners in turn are not unwilling to use social

As the papers in this Symposium volume show, this traditional landscape is changing. Law schools are, with greater regularity, including wider curricular offerings, from domestic law clinics to international field trips and research opportunities. Outside of pre-professional legal education, universities have developed undergraduate majors and graduate degrees in “legal studies” or “law and society,” which seek to situate law in a social and political context.² These developments, both within law schools as well as within university communities more broadly, demonstrate a growing interest in considering law as a social and political phenomenon. If law school training consists principally in teaching students to “think like lawyers,”³ then such an approach may be decreasingly concerned with a diligent adherence to positivist positions, and increasingly concerned with squaring such positivist arguments with their social, political, and moral consequences.

While the study of law within its larger culture is emerging, recognition of law *as* culture is still generally nascent within legal studies and pre-professional programs. In fact, the greater recognition of law’s social and political role may have impeded a consideration of law’s role as culturally specific; accepting law as part of a bigger picture does not necessarily square with seeing such big picture as locally particularized. Yet as law practice becomes more globalized,⁴ such awareness is an increasingly necessary element of any practitioner’s toolkit.

This Article briefly situates law in cultural context before turning to three examples of cross-cultural blunders designed to illustrate the necessity of training in, and sensitivity to, law as culture. The first example comes from private international practice (where high-

science data as legal argument. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954). For a critical response to this trend, see generally ROSEMARY J. ERICKSON & RITA J. SIMON, *THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS* (1998) (discussing the potential danger of allowing an unsystematic application of social science data to influence the law).

2. This author is a founding member of the History, Law & Society program at The American University of Paris.

3. See, e.g., FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 1–12 (2009); Anne-Marie Slaughter, *On Thinking Like a Lawyer*, HARV. L. TODAY (May 2002).

4. The globalization of law is two-directional. Lawyers trained and certified in local jurisdictions may find themselves engaged in international practice, adhering to—and sometimes drafting—newly developing international guidelines. At the same time, global business and the development of private and public international law are increasingly likely to impact local practice, requiring locally trained and practicing lawyers to respond to internationally developed regulations, practices, or precedent.

ly trained professional elites demonstrate adherence to their local legal cultures), the second from international criminal practice (where even full-time professional judges demonstrate difficulties in fully advocating a hybrid system that steps away from the legal culture in which they were trained), and the third from a U.S. federal court (demonstrating the potential for cultural misunderstandings, even within a uni-cultural sphere).

I. LAW AS CULTURE

As Tocqueville famously observed, there is a culture of legalism that pervades the United States.⁵ The centrality of law as an emotional, and not merely administrative, element of U.S. culture is evidenced, for example, in the stories we tell. How many U.S. television shows are centered around law and/or lawyers? Those that spring to mind include *L.A. Law*, *Ally McBeal*, *The Practice* (evolving into the delightfully irreverent *Boston Legal*), and *Shark*, though this list is hardly exhaustive.⁶ Try to conjure a European counterpart to this list. It is no accident that the Germans, French, and Scandinavians do not often make shows about law and lawyers.⁷ In these civil law countries, law and lawyers are understood differently than they are in the United States.

In the United States, law is a space for individual revolutionaries (read: heroes or villains). U.S. lawyers are seen as varieties of articulate wizards, performing a sort of magic, with the attendant awe and distrust that this generates for those outside the field. Most of the world, of course, is comprised of civil law, not common law, jurisdictions. Civil law prizes transparency and predictability as central to legality, seeking, in theory, to retain determinations of law in the hands of the electorate.⁸ In civil law jurisdictions, lawyers occu-

5. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 111-16 (Arthur Goldhammer trans., Library of America 2004) (1835-1840).

6. See *Top 25 TV Shows*, ABA J., www.abajournal.com/gallery/top25tvshows/ (last visited Mar. 29, 2013) (providing the ABA's list of top law-related television programs).

7. This list is drawn from the author's personal entertainment experience. Without access to a truly global entertainment network, this author is loath to assert that the absence of lawyers at the center of television dramas pertains across Asia, Africa, and South America, although such is her suspicion.

8. See generally MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986); JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* (3d ed. 2007) (comparing civil law systems and common law systems).

py a space closer to what the common law world reserves for accountants, where legal expertise comprises knowing the right formula to apply to any given problem.⁹ This work is central to any complex economic and political system, but it is rarely the stuff of legend or song.

Social constructivists argue that the world we know “is not found, but is continuously in the making by the archeological accretion of our individual and collective ascriptions of meaning to the things, events, and places we inhabit.”¹⁰ The meanings we ascribe are, in turn, framed by our cultural, social, and political consciousness, which produce a circularity to constructed consciousness. Change and growth are of course possible, but occur in reference to (temporarily) static cultural elements. Ideas articulated in Benedict Anderson’s *Imagined Communities* (on the mental construction of communities and nationalism)¹¹ can be applied to legal consciousness and the social and political theory of law through such classics as Judith Shklar’s *The Faces of Injustice* (considering justice and the rule of law as reflective of past power, and inherently conservative);¹² Malcolm Feeley’s *The Process is the Punishment* (describing the practices of participants in a lower criminal court in New Haven in the 1970s);¹³ Tom Tyler’s *Why People Obey the Law* (arguing that perceived fairness of process is more essential to law’s legitimacy than benefit of outcome);¹⁴ and Patricia Ewick and Susan Silbey’s *The Common Place of Law: Stories from Everyday Life* (articulating a constitutive theory of law, where law constitutes and is in turn constituted by social and cultural practices, beliefs, and expectations).¹⁵ The examples that follow seek to show how what Martti Koskenniemi calls the “gram-

9. Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VICTORIA U. WELLINGTON L. REV. 817, 818–19 (2001) (discussing the systematic code of civil law systems).

10. Naomi Mezey, *Out of the Ordinary: Law, Power, Culture and the Commonplace*, 26 LAW & SOC. INQUIRY 145, 151–52 (2001) (reviewing PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998)). For an interesting consideration of theoretical perspectives on law and culture, see ROGER COTTERRELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* 97–108 (2006).

11. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 39–48, 85–115 (2d ed. 2006).

12. JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 1–14 (1990).

13. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 3–34 (1992).

14. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 19–39, 42–45 (2006).

15. EWICK & SILBEY, *supra* note 10 at 15–23.

mar” of law¹⁶—a universalism that overcomes divisive legal outcomes—is itself framed by a cultural positioning of law, legal rhetoric, and practice which stubbornly asserts itself in spite of efforts to hybridize, internationalize, or objectify.

II. CROSS-EXAMINATION AT CROSS-PURPOSES

International arbitration presents an example of the prototypically “global” practice of law, where diverse nationalities (and legal traditions) create a shared set of norms.¹⁷ Private international arbitration arises from arbitration clauses inserted into private contracts.¹⁸ An arbitration clause stipulates that an arbitration panel, instead of a domestic court in any jurisdiction, shall hear a disagreement regarding the contract. Arbitration clauses should specify the private arbitration regime under which they shall be governed.¹⁹ Arbitral awards are generally not subject to relitigation by domestic judicial bodies.²⁰

Parties select international arbitration over potential domestic adjudication for many reasons, including concerns regarding local prejudice (actors may fear preferential treatment of domestic actors

16. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 566–73 (Cambridge Univ. Press 2005) (1989). Martti Koskenniemi argues that international law, in particular, constitutes a grammar because it provides a means of problem solving that characterizes law and thereby distinguishes it from pure politics. *Id.* at 562–65.

17. International arbitration has traditionally been the province of a small, elite circle of lawyers and law firms, with extensive crossover between roles, where counsel serve as arbitrators and also have extraordinarily attractive compensation schemes. *See* YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 3–7 (1996). For a domestic perspective, there are U.S.-based arbitration services that are currently making inroads in international practice. *See, e.g., About JAMS, JAMS: THE RESOLUTION EXPERTS*, http://www.jamsadr.com/aboutus_overview/ (last visited Mar. 29, 2013).

18. As distinguished from public international arbitration, which arises between investors and sovereign states under bilateral investment treaties (BITs) concluded between sovereign countries. For further specifics on the practice of private international arbitration, *see* GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* (2d ed. 2001).

19. There are several private arbitration regimes. The most prominent are the International Court of Arbitration, the London Court of International Arbitration, and the Stockholm Chamber of Commerce, each of which has its own rules. Additionally, the United Nations Commission on International Trade Law (UNCITRAL) offers a set of arbitral rules, although it does not administer arbitration disputes itself.

20. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, July 10, 1958, 330 U.N.T.S. 38.

by domestic courts), speedier and less costly processes, and confidentiality (arbitral awards remain private, unlike domestic judicial processes).²¹

International arbitration proceedings look something like a U.S. trial, with written briefs and witness statements filed in advance of an oral hearing. The arbitral panel consists of three arbitrators: one chosen by each side and a third—the Chair—selected by agreement of the arbitrators.²² At the hearing, only those witnesses who the opposing side wishes to cross-examine will be called. One of the many benefits of arbitration is efficiency; by relying on written witness statements and calling only those witnesses who the other side wishes to cross-examine, efficiency is increased.²³

All legal systems rely on written documentation and argument, but only common law makes oral proceedings—and most specifically the art of the cross-examination—a central element of a judicial outcome.²⁴ Cross-examination is designed to elicit new information. This is natural enough for those jurists trained in common law, where the trial functions as a central site to uncover new information.²⁵ This is much less easy to reconcile for jurists trained in civil law systems, where the trial is a time in which judicial theories are confirmed.²⁶

Consider the following example: an international arbitration hearing governed by German law.²⁷ The case turned on several issues, one of which was what responsibility the parties to the contract had to each other under German law. In the course of the proceedings, a civil-law-trained lawyer cross-examining a witness missed exactly the opportunity cross-examination is designed to elicit. In response to a question about how certain documents were exchanged be-

21. See *Arbitration*, INT'L CHAMBER OF COMMERCE, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/> (last visited Mar. 29, 2013).

22. Myriad safeguards are implemented to preserve the legitimacy of arbitrators appointed by each side of a dispute, including the unwritten tendency to issue unanimous arbitral decisions. See generally Int'l Chamber of Commerce, *Arbitration and ADR Rules* (2011), available at <http://www.iccwbo.org/WorkArea/DownloadAsset.aspx?id=2147489109>.

23. For theories, examples, and arguments regarding cross-examination in international arbitration, see generally TAKE THE WITNESS: CROSS-EXAMINATION IN INTERNATIONAL ARBITRATION (Lawrence W. Newman & Ben H. Sheppard, Jr. eds., 2010).

24. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 8, at 131 (discussing cross examination in common law and civil law systems).

25. ROBERT P. BURNS, A THEORY OF THE TRIAL 32 (1999).

26. MERRYMAN & PÉREZ-PERDOMO, *supra* note 8, at 113, 131.

27. This example is drawn from the author's arbitration practice. For reasons of confidentiality, it is not possible to provide more detail regarding the case or its disposition.

tween the parties, the witness exclaimed in exasperation: “[I]t all happened so quickly! We only had a day or two to prepare everything!” This represented an opportunity for the lawyer performing the cross-examination to follow up with questions regarding the preparation of the documents, and whether this had been as careful or precise as was standard. This could have indicated a potential liability. But the civil-law-trained lawyer had prepared a list of questions that he understood to represent a cross-examination, and he dutifully adhered to his list. He took the witness’s exasperated exclamation, thanked him for the answer, and moved on. This represents an oft-repeated cultural blunder—an unfamiliarity with the *purpose* underlying a certain professional practice. Performance of a practice is insufficient if you do not situate the cultural significance of that practice.

Of course, such blunders are not one-sided. Common-law-trained lawyers, while familiar with cross-examination’s purpose and possibilities, suffer from their own blindness. For example, common law lawyers sometimes exert an adversarial zeal that falls flat with a civil law audience, particularly the civil-law-trained arbitrators. What might be understood as zealous representation of the client (i.e., pointed, theatrical accusations of fraud and dishonesty on the part of the other side) can easily fall outside the bounds of professional behavior for civil-law-trained arbitrators.

III. PLEA-BARGAINING AT INTERNATIONAL CRIMINAL LAW: SOME PLEA, NO BARGAIN

The International Criminal Tribunal for the former Yugoslavia (ICTY) is an ad hoc criminal court employing a hybrid procedure drafted by the ICTY itself.²⁸ The professionals employed by the ICTY hail from common and civil law jurisdictions and are tasked with applying the particularized substantive and procedural practices of the ICTY.

After nearly twenty years of practice, the ICTY has developed a significant jurisprudence and a well-practiced procedure. Some legal professionals have served at the ICTY for more than a decade, working with the procedure as it developed and participating in the

28. See Int’l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev. 48 (Nov. 19, 2012) [hereinafter ICTY Rules], available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev48_en.pdf.

creation of that jurisprudence. And yet, even among these legal professionals, for whom a globalized, hybrid judicial process is their bread and butter, there still exists a constant, recurring devotion to the legal culture in which one is trained, be it common law or civil law. These legal professionals are so firmly situated in the culture in which they are trained that they often resist, and sometimes effectively reject, the tenets of the hybrid system for which they work.²⁹

One particularly problematic, but interesting, element of ICTY practice is plea bargains. The ICTY has now adjudicated twenty guilty pleas.³⁰ When a defendant pleads guilty, the hearing is avoided (or, if already begun, stopped) and the ICTY moves directly to a sentencing hearing. At the sentencing hearing, the singular question before the Tribunal is the appropriate sentence. Sentencing at the ICTY is notoriously unstructured.³¹ Judges are able to sentence a defendant to what amounts to time served, resulting in immediate liberty, or to a life sentence.³²

The practice of plea bargaining is essentially a common law practice.³³ Certain civil law systems have begun to dabble in it, but they

29. Speaking under the promise of anonymity, an ICTY employee stated:

It's wrong to have a trial chamber composed of just common or just civil law judges. You need to mix . . . because some rules make more sense to you, so you apply them. The rest you ignore. So you're reading through the rules and you pick the ones you like, that make sense. Everyone does this, prosecution, defense, judges—they all do. This is wrong—people should come to the ICTY to learn. But instead they import some things and not others.

Interview with anonymous legal professional, International Criminal Tribunal of the former Yugoslavia in The Hague, Netherlands (May 2005). *But see* Patricia M. Wald, *ICTY Judicial Proceedings: An Appraisal from Within* 2 J. INT'L CRIM. JUST. 466, 466–67 (2004) (former ICTY judge arguing that although not all international bodies have respected their rules of procedure, at the ICTY, "[j]udges have risen above parochial loyalties, or even local legal practices, to follow faithfully the rules and procedures agreed upon by the Court, as well as the strictures of the ICTY Statute.").

30. *Guilty Pleas*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/26> (last visited Mar. 29, 2013).

31. The "confusing, disparate, inconsistent, and erratic" sentencing policy of the ICTY has been charged with "giv[ing] rise to distributive inequalities." MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 11 (2007). ICTY sentencing has been referred to as "Russian roulette." OLAOLUWA OLUSANYA, *SENTENCING WAR CRIMES AND CRIMES AGAINST HUMANITY UNDER THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 139 (2005). Others criticize ICTY sentences as too lenient, particularly given the gruesome nature of the crimes in question. *See, e.g.*, Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 688–89 (2007).

32. The latter is quite infrequent.

33. Andrew Dubinsky, *An Examination of International Sentencing Guidelines and a Proposal for Amendments to the International Criminal Court's Sentencing Structure*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 609, 625–26 (2007).

represent interesting exceptions to a general rule.³⁴ Plea bargaining at common law involves the reduction in the charge brought by the prosecutor, or the sentence imposed, or both, in exchange for the defendant's plea of guilt.³⁵ This practice saves judicial resources by avoiding trial, a tremendously costly expenditure at common law.³⁶ Plea bargaining is made possible because the common law system places discretion regarding the determination of charges in the hands of the litigants.³⁷ In other words, at common law, it is in fact possible for the prosecution and defense to "bargain" over the defendant's sentence because they both exert control over certain decisions, and because the adversarial system makes a bargain attractive to both parties.³⁸

The "horse trading" ³⁹ element of plea bargaining is objectionable in principle to jurists trained at civil law. At civil law, justice consists of identifying and punishing specific crimes; this limits, and virtually prohibits, prosecutorial discretion and charge inflation. At civil law, trials are unavoidable, even where a defendant admits guilt, and represent a far smaller expenditure of judicial resources.⁴⁰ Simply put, at civil law, there is no logic to plea bargaining. This assists in making the practice morally objectionable to civil-law-trained jurists.

At the ICTY, with jurists from both systems and a hybrid procedure that borrows procedural elements from both systems, plea bargaining exists in a hybrid form as well. Plea bargains are attractive to ICTY jurists because they reduce strain on the Tribunal and result in concrete admissions of guilt.⁴¹ Arguably, such admissions

34. See, e.g., MERRYMAN & PÉREZ-PERDOMO, *supra* note 8, at 132; William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT'L L. 429, 438-40 (2004).

35. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 3-5 (1979).

36. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1935 (1992).

37. See *id.*

38. See *id.*; see also Jon L. Heberling, *Conviction Without Trial*, 2 ANGLO-AM. L. REV. 428, 431 (1973).

39. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

40. MICHEL FROMONT, *GRANDS SYSTÈMES DE DROIT ÉTRANGERS* [Major Systems of Foreign Law] (Dalloz 4th ed. 2001); Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 19-20, 22, 27 (2004).

41. "[A] guilty plea contributes directly to one of the fundamental objectives of the International Tribunal: namely, its truth-finding function." Prosecutor v. Sikirica, Case No. IT-95-8-S, Sentencing Judgment, ¶ 149 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 13, 2001),

also increase reconciliation and truth telling in the Former Yugoslavia,⁴² a central secondary goal of the Tribunal.⁴³ Yet prosecutors at the ICTY only have control over the “charge bargaining” element of plea bargaining; sentences remain in the hands of ICTY judges,⁴⁴ many of whom reject as a matter of principle (i.e., legal culture) the possibility of a defendant bargaining to reduce his sentence. This has resulted in a number of reduced charges and an incongruous and opaque sentencing record.⁴⁵

As an example, consider Milan Babić, a dentist and local politician who found himself the leader, for a brief moment, of the ethnic Serb secession movement in Croatia.⁴⁶ Babić’s leadership was brief, and he appears to have broken with Slobodan Milošević (the leader of Serbia proper and a driving force of the wars in the former Yugoslavia).⁴⁷

<http://www.unhcr.org/refworld/pdfid/414836664.pdf> [hereinafter Sikirica Sentencing]. “A guilty plea is always important for the purpose of establishing the truth in relation to a crime.” Prosecutor v. Todorovic, Case No. IT-95-9/1-S, Sentencing Judgment, ¶ 81 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2001), <http://www.icty.org/x/cases/todorovic/tjug/en/tod-tj010731e.pdf> [hereinafter Todorovic Sentencing].

42. See Sikirica Sentencing, *supra* note 40, ¶ 149. “The Trial Chamber accepts that acknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs, will promote reconciliation.” Prosecutor v. Plavsic, Case No. IT-00-39&40/1-S, Sentencing Judgment, ¶ 80 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003), <http://www.unhcr.org/refworld/pdfid/3e5f717a4.pdf> [hereinafter Plavsic Sentencing].

43. “Reconciliation” is not explicitly mentioned in United Nations Council Resolution establishing the ICTY. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993). Chief Judge Antonio Cassese mentioned the purpose of reconciliation as central to the Tribunal’s work in the 1994 report to the U.N. Pres. Int’l Trib., *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, transmitted by Note of the Secretary-General, ¶ 16, U.N. Doc. S/1994/1007 (Aug. 29, 1994). The Prosecutor’s Office has repeatedly noted the ICTY’s reconciliatory role. See, e.g., Press Release, U.N. ICTY, Address by Tribunal Prosecutor Carla Del Ponte to NATO Parliamentary Assembly in Belgrade: The ICTY and the Legacy of the Past, U.N. Press Release CdP/QTP/PR1193e (Oct. 26, 2007), available at <http://www.icty.org/sid/8829>. “The Tribunal was established as a measure to restore and maintain peace and promote reconciliation . . .” *Id.*

44. See Janine Natalya Clark, *Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation*, 20 EUR. J. INT’L L. 415, 424, 427 (2009).

45. See, e.g., Plavsic Sentencing, *supra* note 42, ¶¶ 2–5. Biljana Plavsic, charged with eight counts, including genocide, saw a reduction to one count, “persecutions,” with an agreement to plead guilty. *Id.*

46. Prosecutor v. Babić, Case No. IT-03-72-S, Sentencing Judgment, ¶¶ 18–23 (Int’l Crim. Trib. for the Former Yugoslavia June 29, 2004), <http://www.icty.org/x/cases/babic/tjug/en/bab-sj040629e.pdf> [hereinafter Babić June Sentencing].

47. See LAURA SILBER & ALLAN LITTLE, YUGOSLAVIA: DEATH OF A NATION 202–04 (1997).

Babić was an entirely voluntary ICTY participant. After learning that his name was listed in the indictment against Milošević, Babić voluntarily approached the Tribunal.⁴⁸ Over the course of several interview sessions, Babić offered more than 1000 pages of testimony that incriminated others as well as himself.⁴⁹ When he was eventually indicted on the material he had provided to the Tribunal, Babić wasted no time in pleading guilty.⁵⁰ His sentencing hearing occurred in 2004.⁵¹

As noted, ICTY sentencing is unpredictable. Formally, the only guidelines offered by the ICTY Statute are that the Tribunal “shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.”⁵² Furthermore, the Tribunal “should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person” without further specificity.⁵³ The ICTY Rules of Procedure have clarified the question only by noting that “substantial cooperation with the Prosecutor by the convicted person before or after conviction” is a “mitigating circumstance.”⁵⁴ Through its case law, the ICTY has established that it has discretion to consider other potentially mitigating factors,⁵⁵ which it has defined as voluntary surrender,⁵⁶ guilty plea,⁵⁷

48. Babić June Sentencing, *supra* note 46, ¶ 2.

49. *Id.* ¶¶ 73–74.

50. Babić was indicted on aiding and abetting a joint criminal enterprise, to which he entered a guilty plea. *Id.* ¶¶ 4–6. In response to the plea agreement entered on January 12, 2004, the Trial Chamber suggested that the legal basis for the indictment would more accurately be “co-perpetrator” of a joint criminal enterprise. *Id.* ¶ 8. Babić dutifully pleaded guilty to this more severe charge. *Id.*

51. *Id.* ¶ 13.

52. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 24(1), S.C. Res. 1877, U.N. Doc. S/RES/1877 (July 7, 2009) [hereinafter ICTY Statute]; Babić June Sentencing, *supra* note 46, ¶ 43, n.61.

53. Babić June Sentencing, *supra* note 46, ¶ 43, n.61.

54. ICTY Rules, *supra* note 28, Rule 101(B).

55. Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment, ¶ 713 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

56. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Trial Judgment, ¶¶ 853, 860, 863 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <http://www.unhcr.org/refworld/pdfid/40276c634.pdf> [hereinafter Kupreskic Judgment]; Prosecutor v. Kupreskic, Case No. IT-95-16-A, Appeals Judgment, ¶ 430 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001), <http://www.unhcr.org/refworld/pdfid/40276b7e7.pdf> [hereinafter Kupreskic Appeal]; Prosecutor v. Kunarac, Case No. IT-96-23-T/1-T, Trial Judgment, ¶ 868 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://www.unhcr.org/refworld/pdfid/3ae6b7560.pdf>; Plavsic Sentencing, *supra* note 42, ¶¶ 82–84.

expression of remorse,⁵⁸ good character with no prior criminal convictions,⁵⁹ and the post-conflict conduct of the accused. It was these questions of aggravating and mitigating aspects of the case that formed the basis of the witness testimony and evidence proffered at Babić's sentencing hearing.

In support of what the prosecution and defense both urged be a sentence of less than eleven years,⁶⁰ two witnesses were called. The first witness, an ethnic Croat psychiatrist, testified regarding the psychological damage of the war on civilians. The second was a fellow local politician, Dragon Kovačević,⁶¹ who served in government with Babić, although he represented a non-ethnically based party that existed only very briefly. Kovačević endeavored to explain the context of Babić's service to the Serb ethnic party, explaining that when Babić resisted Milošević's demands, he was ousted from leadership.⁶² Leading Serb politicians publicly referred to him as a traitor and a stooge (he was specifically labeled "Župan," which is a prefect of the Croatian state).⁶³

57. Kupreskic Appeal, *supra* note 56, ¶ 464; Prosecutor v. Jelusic, Case No. IT-95-10-A, Appeals Judgment, ¶ 122 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001), <http://www.unhcr.org/refworld/pdfid/4147fcad4.pdf>; Sikirica Sentencing, *supra* note 41, ¶¶ 48-51, 192-93, 228; Todorovic Sentencing, *supra* note 41, ¶¶ 75-82; Prosecutor v. Erdemovic, Case No. IT-96-22-This, Sentencing Judgment, ¶ 16(ii) (Int'l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998), <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts980305e.pdf> [hereinafter Erdemovic Sentencing]; Plavsic Sentencing, *supra* note 42, ¶¶ 66-81.

58. Sikirica Sentencing, *supra* note 41, ¶¶ 152, 194, 230; Todorovic Sentencing, *supra* note 41, ¶¶ 89-92; Erdemovic Sentencing, *supra* note 57, ¶ 16(iii); Plavsic Sentencing, *supra* note 42, ¶¶ 66-81.

59. Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 519 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=414806c64>; Kupreskic Judgment, *supra* note 56, ¶ 478; Kupreskic Appeal, *supra* note 56, ¶ 459; Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Trial Judgment, ¶ 236 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999), <http://www.icty.org/x/cases/aleksovski/tjug/en/ale-tj990625e.pdf>; Erdemovic Sentencing, *supra* note 57, ¶ 16(i).

60. The suggested length of eleven years was based on the sentence passed on Biljana Plavsic, a member of the tri-partite Bosnian Serb presidency who pleaded guilty to persecutions. See Plavsic Sentencing, *supra* note 42, ¶ 134. Like Babić, Plavsic was a sidelined leader who can be understood as "less guilty" than his contemporaries for the atrocities committed by his state. *Id.* ¶¶ 65-81. Unlike Babić, Plavsic cooperated very little and very reluctantly with ICTY. See *id.* ¶ 63.

61. Prosecutor v. Babić, Case No. IT-03-72-S, Transcript of Sentencing Hearing, ¶ 169:24 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 2, 2004), <http://www.icty.org/x/cases/babic/trans/en/040402SE.htm> [hereinafter Babić Apr. Sentencing].

62. SILBER & LITTLE, *supra* note 47, at 203-04.

63. Babić Apr. Sentencing, *supra* note 61, ¶¶ 181-82.

On one occasion, Babić was attacked in his home where he was badly beaten, and needed medical treatment. These contextual details are legally important; personal danger has in other cases been recognized as a mitigating factor in punishment.⁶⁴ Yet as Kovačević began describing Babić's near-fatal beating, Justice Orić interrupted him, criticizing the line of questioning as "really entering the realm of speculation."⁶⁵ Judge Orić specifically criticized the testimony as problematically embodying hearsay, even while recognizing in nearly the same breath that hearsay is admissible before the ICTY, saying "what words were exactly used by the attackers if the witness has not been there, of course, is hearsay. I'm not saying hearsay is not admissible in the Tribunal."⁶⁶ Yet even after recognizing that hearsay evidence is admissible at the ICTY, Judge Orić nevertheless moved the questioning in a different direction.⁶⁷

Ultimately, the judges rejected the prosecution's suggested sentence of no more than eleven years and sentenced Babić to thirteen.⁶⁸ While the ICTY cited Babić's cooperation as a mitigating factor, it ultimately ruled against the witness's (and even the prosecution's) portrayal of Babić and his situation, finding:

Babić was a regional political leader who sought to promote what he considered the interests of his people to the detriment of Croats and other non-Serbs by serious violations of international humanitarian law. His lack of moral strength prevented him from standing against injustice committed against non-Serb civilians and led him to become involved in a joint criminal enterprise. By admitting his guilt in relation to the armed conflict in Krajina in 1991-1992, Babić demonstrated some courage. Yet the Trial Chamber is not convinced that he has, at all times, recognized the full significance of the role he played in Croatia in that period.⁶⁹

In addition to the speculative and unpredictable rationale demonstrated by this judicial finding, the judgment shows how little

64. See, e.g., Erdemovic Sentencing, *supra* note 57, ¶ 16.

65. Prosecutor v. Babić, Case No. IT-03-72, Transcripts, ¶ 148:11 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 1, 2004), <http://www.icty.org/x/cases/babic/trans/en/040401SE.htm>.

66. *Id.* ¶ 151:5-7.

67. *Id.* ¶ 151:5-13.

68. Babić June Sentencing, *supra* note 46, ¶¶ 99-102.

69. *Id.* ¶ 98.

Babić's extensive cooperation mattered to the Tribunal. This cooperation mattered significantly to the prosecutor, who characterized it as "substantial."⁷⁰ Yet in the hybrid system of plea bargaining that occurs at the ICTY, prosecutorial appreciation of the cooperation of the indicted matters only as much as the Tribunal determines. This determination, in turn, will owe much to the particular constitution of the judicial tribunal.

Two years after his sentence, in the midst of offering testimony against his colleague Milan Martić, Babić hung himself in his cell.⁷¹

IV. CULTURE IN A PURELY DOMESTIC SPHERE

This Article's final example is drawn from domestic U.S. practice. Cultural sensitivity and complexity are not limited to international practice, but can also impact lawyers' practices in decidedly local matters. This example is drawn from the author's judicial clerkship before a federal district court in Texarkana, Texas. Texarkana is a modest city located along Interstate 30 on the Texas/Arkansas border. Culturally both southern and Texan, the city and its surroundings are a mix of urbane and country, home to highly trained professionals, self-made business people, farmers, and civil servants.

Jury selection often offered an example of local homogeneity. Asked about her hobbies, any potential juror over the age of fifty was likely to reply, "cross-stitching and playing with my grandchildren." Men of all ages listed "hunting and fishing" as their principal interests.⁷²

Even within such homogeneity, however, there existed the potential for cultural blunder. In one memorable case involving cattle rustling, the defendant-husband had stolen cattle and laundered funds through the defendant-wife's bank account. Because the funds had entered her account, the wife shared criminal liability. She came before the court, confused, terrified, and clearly out of her element. When asked to offer an explanation for her actions, the defendant was confused by the term "liability." Because this particular legalese was not part of her vocabulary and experience, she was unable to

70. *Milan Babić Sentenced to 13 Years' Imprisonment*, U.N. INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA (June 29, 2004), <http://www.icty.org/sid/8406>.

71. *Milan Babić Found Dead in Detention Unit*, U.N. INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA (Mar. 6, 2006), <http://www.icty.org/sid/8801>.

72. Delightfully, one potential male juror, asked to describe his hobbies outside of work, replied pensively, "Well, I like to bowl. . . . But I *love* to hunt and fish!"

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address it. What the prosecutor termed “obfuscation” was more likely a cultural lapse, an inability to understand the language provided, and perhaps confusion over how someone who had been victimized could come before the court as a defendant.

CONCLUSION

In both domestic and international legal practice, an awareness of the cultural relevance, place, and function of legal norms and practices can increase lawyers’ efficacy. An increased focus on law within society as part of legal training takes lawyers part of the way in understanding the constitutive nature of law within society. By exploring aspects of law as culture, this Article argues for a holistic approach to the practice of law, pushing beyond legal positivism through greater awareness of and sensitivity to the myriad ways that *expectation*—the shadow of culture—works at cross-purposes with the effective practice of law.