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Justiciability as Field Effect: When Sociology Meets Human Rights*

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In their article, Judith Blau and Alberto Moncada deliver a provocative argument about how we should imagine and institutionally act upon human rights violations. Inspired by the internationally quickening pace of legal authority in prosecuting violations of humanitarian law, Blau and Moncada build an argument that there is little reason to distinguish between violations of human rights and of humanitarian law. Their article suggests profound ways in which a sociological lens might transform current debate. First, Blau and Moncada refuse to ignore a wide array of human misery and suffering simply because there is no individual perpetrator, and thereby defend a range of economic and social rights; and second, they envision remedies that extend beyond formal institutions, and include communities, civil society organizations, and individual citizens in dialogue, sanctions, and reforms. In creating a sociological approach that can inform and act upon human misery, the article is an evocative example of democratic politics pursued with sociological commitment (Bourdieu *et al.*, 1993; Wacquant, 2005).

We focus on a central aspect of Blau and Moncada's argument: that a wider range of human rights violations ought to be regarded as

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justiciable, legally actionable, and formally criminalized. Although we share their normative goals, the turn to law they advocate also presents us with concerns. Our goal is to induce a reflexivity about our scholarly and political tools: we interrogate the turn to law in determining the content, scope, and solution for human rights violations by flagging some of how law operates in transnational contexts.

Much of our analysis stems from a "process turn" that emphasizes how arenas such as law are developed and promoted through sets of actors, constraints, and embedded norms (Fourcade and Savelsberg, 2006). By highlighting these issues, we hope to encourage a reliance on legal institutions that remains aware of their limits and their own direction, and to provoke an approach that seeks redress for human rights violations while remaining attuned to its implications.

International law scholars have a long tradition of questioning how wide a scope we should urge on legal forums in addressing human rights and humanitarian concerns. A core part of this debate is explicitly political within states, the academy, and the field of international relations. For instance, there is little doubt that the willingness to support legal solutions is tied to power within as well as between powerful states, so that in recent years the success of the field of international criminal law has intersected closely with the politics of U.S. administrations (Dezalay and Garth, 2006; Hagan *et al.*, 2006). Yet despite the heroically progressive achievements of Baltasar Garzón's indictment of Augusto Pinochet, or Louise Arbour's indictment of Slobodan Milosevic (Hagan, 2003; Hagan and Levi, 2004; Sugarman, 2002), it is not always so simple as to argue that legal intervention is—either in process or in effects—the politically progressive response. Rather, as David Kennedy's (2004) *Dark Sides of Virtue* demonstrates, international humanitarian activists as well as the legal doctrines they champion (and, often, the legal tools that capture their imagination) need themselves to be aware of potential blind spots that their politics, their legal expertise, and their sheer influence can encourage. This includes the possibility that legalizing harms can be a way of avoiding, rather than engaging, responsibility (Kennedy, 2004:34).

A large element of this problem stems from professional cultures taking their own directions and normative constraints. Annelise Riles (2006) demonstrates the deeply instrumental character of the human rights legal culture, its intellectual commitments, and the challenges that it creates—for practitioners, observers, and critics alike—for then thinking of humanitarian problems in terms beyond these conceptual tools. Human rights law often is focused on crafting its analytical devices and doctrinal tools, and the protection of human rights institutions themselves, largely

within the symbolic and resource-based context of U.S.-based law schools. This circumscribes the institutional boundaries of human rights within the hierarchy of the U.S. legal academy and profession (Dezalay and Garth, 2001), while remaining relatively agnostic about the substantive justice goals to which activists seek to put these powerful legal resources.

One result, as Riles suggests, is that speaking outside the language of law can become inordinately difficult. This may be true for the anthropologist who seeks to contextualize the socioeconomic circumstances of rights abuses; even more to the point, this can silence localized forms of resistance, problems to be addressed, and critical frameworks that do not meet the knowledge format of legal expertise. The effect may be to marginalize "outside" voices (Kennedy, 2004; Rajagopal, 2003; Riles, 2000, 2006).

The resulting *articulation* of crises, miseries, and human rights violations in terms of law comes with a new set of effects. Law is often a prime institutional forum for the very project of articulation (Choy, 2005): questions of format not only can come to trump "substance," but indeed the form at times becomes the substance (e.g., Felstiner *et al.*, 1980–1981). The implication of how events become "articulated" is that the needs of poor communities, the voices of victims, or even alternative measurements of what constitutes "success," "redress," or "development" can literally fall off the map (see, e.g., Garth, 2001).

Given the authoritative power that law often enjoys and through which legal professionals present themselves—perhaps especially when filling a political vacuum—the result is not only that legalization of human rights problems can produce a specific narrative for use within professional legal sites. The result may further be a restricted historical record that is contemplated and produced with law already in mind, and in which heterodox questions of inequality or politics are ignored or devalued—a record that may be contested or supplemented in other (often informal) sites, but that is equally stamped with the veneer of being official and authoritative (Bourdieu, 1987). Certainly, refraining from action is not preferable, but we must be aware of the format our collective responses to these violations take. This opens a profoundly ethical moment of acting through legal institutions while acknowledging, learning, and integrating in our collective memories the transformative and stultifying capacities these legal formats can engage (Kennedy, 2004).

Witness the concerns that victims in war-torn regions voice about international criminal prosecutions, and of the uncertain capacity for legal forums to produce the discussions among communities, private enterprise, civil society, and the state to which Blau and Moncada aspire. Also potentially compromised is the audience legal prosecutions can successfully engage. Thus Blau and Moncada's approach runs the risk of equating

legalization with justice or redress. Yet reform strategies based on legal decisions can have unanticipated consequences. The institutional demands of legal forums are often in competition with local demands or views.

Much may turn on the particular legal forum contemplated. It is probably less instructive to speak of "law" (or even legal adjudication) in general, without attending to different forums and the local reforms and redress that they are likely to produce. As Martha Minow suggests, law provides a *repertoire* (1998:89) of powerful responses to violence, human rights violations, and atrocities. She canvasses twentieth-century responses to mass violence through trials, truth commissions, and reparations—each of which is differently suited to the even wider range of societal goals to which law is said to be put, and the *choice* of which produces its own set of politics and contestations to which we must remain aware and deeply attuned. Engaging law, then, demands that we also engage the politics, opportunities, and limits of the legal forums pursued.

There is perhaps an important lesson here from the field of criminology. In the mid-twentieth century, Edwin Sutherland (1949) raised the issue of white-collar crime for U.S. sociologists. Although he initially encountered objections that these corporate actions would not result in criminal convictions, Sutherland noted that civil justice forums could provide accessible and useful remedies. In the areas that Blau and Moncada discuss, many institutional options are on the table—criminalization is one, but so are reparations, civil courts, truth commissions, and so on. Engaging legal responses, then, need not be limited to criminalization, particularly given the demanding burdens of proof and individual-based nature of sanctioning that dominate criminal law. John and Jean Comaroff (2004:199–200) demonstrate that a shift from criminal to civil law actions is giving unexpected flexibility and sensibility to legal decision making in the new South Africa.

It may be particularly important to elaborate two of Blau and Moncada's examples. Slobodan Milosevic, while indeed successfully indicted by the International Criminal Tribunal for the Former Yugoslavia, died before his literally unending trial concluded. And while Augusto Pinochet was successfully indicted by Garzón's creative (and positively heroic) use of legal processes, only some of his crimes were deemed justiciable by the House of Lords, and his extradition to Spain was forestalled by the UK Home Secretary's decision to allow his return to Chile, where Pinochet died without facing a Chilean trial. The Milosevic indictment was the first such action against a sitting head of state; the Pinochet indictment and extradition proceedings gave traction to the possibility of universal jurisdiction. We want to stress the importance with which we view these celebrated indictments and arrests for the building of legal doctrine, for

victims, and for public memory, but highlight that both instances ring cautionary notes about law as well.[3]

International human rights law is also not a hermetically sealed legal culture, but deeply heteronomous, particularly in the sort of transnational settings that Blau and Moncada describe. For instance, our own research suggests that to understand the implications of increased juridification, we cannot limit ourselves to studying lawyers and court process: we must be aware of the embedding of overlapping fields of expertise. In the field of international criminal law we find that not only must international tribunals balance the politics of competing states, but that they must equally manage (and comply with) the politics of public opinion and mass media to sustain the budgets and the profiles their prosecutions require. They must also work with the competing epistemologies of experts on atrocities—including forensic examiners, social workers, and demographers—to develop an understanding of victimization itself.

Juridification, then, does not engage law alone in determining what sort of evidence is required to prove human rights violations. It is often statisticians and other experts who are then invested with the epistemological authority for determining the scope of the violation, as well as the status of who is a "victim." This point resonates with recent research in science and technology studies (e.g., Latour, 2005; Valverde, 2005). When we place our faith in law, calls for increased juridification do not only import more lawyers and legal concepts, they equally engage a whole series of journalists, demographers, statisticians, social workers, budgetary administrators, military experts, and forensic examiners, all of whom further influence legal proceedings.

For sociology, however, we must take up what Blau and Moncada most valiantly present us with, namely, a critical opportunity to advance beyond the narrow provincialism through which we often interpret questions of crime. Over 30 years ago, Herman and Julia Schwendinger (1975:147) posed a similar challenge to American criminal law and criminologists.

> Isn't it time to raise serious questions about the assumptions underlying the definition of the field of criminology while agents of the state can, with impunity, legally reward men who destroy food so that price levels can be maintained while a sizable portion of the population suffers from malnutrition?

[3] For sake of completeness, we must also make note of the more recent decision of the International Court of Justice, which holds Serbia responsible for no more than failing to prevent (rather than incite and conduct) genocide in the former Yugoslavia and attaches no penalties, financial or otherwise. Needless to say, the citizens and government of Bosnia, which invested so heavily in this case, were singularly dismayed and disappointed with the outcome.

The Schwendingers wanted the U.S. state and U.S. criminology to guarantee and protect the rights of all persons to "well-being, including food, shelter, clothing, medical services, challenging work and recreational experiences, as well as security from predatory individuals or repressive and imperialistic social elites" (1975:145). This is a challenge rarely taken up in U.S. criminology, which has generally focused its attention on the administrative control of crime rather than on state violence itself, a disciplinary myopia that may well be part of the broader denial of atrocities and human suffering (Cohen, 2001). Yet we also cannot ignore that the Schwendingers were writing in the heyday of the civil rights, women's, welfare, and gay rights movements. Poverty and welfare rights law and lawyers were indeed on the march and making progress in U.S. courts. Many of these gains have since subsided, if not disappeared.

Taking this point to heart, the very terms of the debate that Blau and Moncada engage—whether to increase the scope of legal and, indeed, criminal responsibility—raises questions we should address. Legal proceedings often place us in a paradigm of thinking about inequality and humanitarian violations as momentary, episodic crises that can be resolved through adjudication (Engle, 2006; Koskenniemi, 2002). One of Blau and Moncada's most trenchant goals is to expand this episodic-based frame to include more quotidian, while nonetheless dramatic, violations of economic, social, and human rights.

Law is an important site through which to gain the attention and democratic reforms that Blau and Moncada emphasize. The pace and gains of international law over the past two decades have been tremendous. Even in the less than fully successful instances, such as Milosevic or Pinochet, the very possibility of a forum where human rights abuses can find redress is itself influential. The symbolic power of law may generate new claims, new proceedings, and new reforms and it may then become part of individuals' (and perhaps states') conceptual toolkits. Most notably, actors distant from legal forums may find their local cultural repertoires changed by legal advances and by the possibility (even if remote) of making claims in the name of human rights or international law (Sewell, 1992; Swidler, 2001). The polysemy of the human rights institution, and the uses to which it may be put or transposed, can thereby have productive and progressive results. And if justice always remains beyond law, it is nonetheless the case that seeking justice demands us to continue appealing to the force of law, even if it is always outstripped (Derrida, 2004).

Yet the scholarly impulse to shift the professional register to "law" in order to solve these problems reveals, perhaps, law's increasingly strong hold on the "international" as such: that when we turn our disciplinary and political attention to problems of this scale, we reach toward legal

adjudication as a prime solution. This is so despite many of law's own failures to achieve the sort of social reforms that Blau and Moncada seek, as currently witnessed in the War on Terror and in the enfeeblement of international criminal law (e.g., Scheppele, 2006). The impulse to rely on law is perhaps surprising given its often state-based quality and its inherently compromised transformative potential given the black box of politics that underwrites it. The perception of law as the dominant frame for considering solutions is surely an impressive achievement of legal professionals since the end of the Cold War and connected to law's disciplinary expansion as a tool for societal reconciliation, international development, and neoliberal economic reform (Dezalay and Garth, 2002).

As sociologists come to entrust law as the solution, we perhaps see a further indication that the debate has narrowed and that sociologists, in calling public attention to problems in forms that can command attention and resources, are themselves reaching out to law in hopes of finding a prestigious and powerful ally rather than an object of study. The prestige that law enjoys tends to draw other disciplines into promoting its cause—often precisely in order to gain a symbolically valuable foothold for their own local arguments. Yet we must retain some skepticism of law as one of sociologists' *faux amis* (Bourdieu, 1987). Although often deploying concepts that resonate and to which we aspire, when deployed within legal settings, the terms of "rights" or "labor standards" might actually take on a more limited (and technocratic) quality and so sociological responses must remain vigilant.

Our pursuit of law should perhaps remain especially reflexive because as a discipline, law—especially as produced in the sorts of international agencies that Blau and Moncada describe as potential adjudicatory bodies—in recent decades has hitched its disciplinary wagon to economics more than sociology. The effect of this is to avoid much of the contextual debate and research that Blau and Moncada seek to promote. This is linked to an internal competition about what types of law—and with it, which lawyers, from where, and with which hierarchies—will be able to shape an increasingly juridified field (Dezalay and Garth, 2002). International institutions adopt and reinforce some legal cultures rather than others, notably privileging common-law approaches, while the civil law finds itself struggling to compete for attention or alternatively adopting U.S.-based legal models (Aguila, 2004; Garth, 2001); and international adjudicatory bodies such as the World Trade Organization have been identified as key components in the institutionalization of neoliberal globalism (e.g., Chorev, 2005). Often in effacing these internal competitions, law's seduction rests precisely on its claims to universals and it may well be that *the recruitment of sociology to law's disciplinary enterprise*, achieved

precisely because law holds out attractive transformative potential, is worth keeping an eye on.

REFERENCES

Aguila, Yann. 2004. "Éditorial," *Recherche: Droit et Justice* 17: 1.
Bourdieu, Pierre. 1987. "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal* 38: 805–853.
Bourdieu, Pierre, Alain Accardo, Gabrielle Balazs, Stéphane Beaud, François Bonvin, Emmanuel Bourdieu, *et al.* 1993. *La Misère du Monde*. Paris: Seuil.
Chorev, Nitsan. 2005. "The Institutional Project of Neo-Liberal Globalism: The Case of the WTO," *Theory and Society* 34: 317–355.
Choy, Timothy. 2005. "Articulated Knowledges: Environmental Forms after Universality's Demise," *American Anthropologist* 107: 5–18.
Cohen, Stanley. 2001. *States of Denial: Knowing about Atrocities and Suffering*. Cambridge: Polity.
Comaroff, John, and Jean Comaroff. 2004. "Criminal Justice, Cultural Justice: The Limits of Liberalism and the Pragmatics of Difference in the New South Africa," *American Ethnologist* 31: 188–204.
Derrida, Jacques. 2004. *Rogues: Two Essays on Reason*. Stanford, CA: Stanford University Press.
Dezalay, Yves, and Bryant Garth. 2001. "Constructing Law Out of Power: Investing in Human Rights as an Alternative Political Strategy," in Austin Sarat and Stuart Scheingold (eds.), *Cause Lawyering and the State in a Global Era*: pp. 354–382. Oxford: Oxford University Press.
Dezalay, Yves, and Bryant Garth. 2002. *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*. Chicago: University of Chicago Press.
Dezalay, Yves, and Bryant Garth. 2006. "From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights," *Annual Review of Law and Social Science* 2: 231–255.
Engle, Karen. 2006. "Calling in the Troops to Save Women: Defining Genocide and Rape." Paper presented at the Feminism & Law Workshop, Faculty of Law, University of Toronto, September.
Felstiner, William, Richard Abel, and Austin Sarat. 1980–1981. "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming," *Law and Society Review* 15: 631–654.
Fourcade, Marion, and Joachim Savelsberg. 2006. "Global Processes, National Institutions, Local Bricolage: Shaping Law in an Era of Globalization," *Law & Social Inquiry* 31: 513–519.
Garth, Bryant. 2001. "Rethinking the Process and Criteria for Success," in Rudolf V. Van Puymbroeck (ed.), *Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century*: pp. 11–28. Washington, DC: World Bank.
Hagan, John. 2003. *Justice in the Balkans: Prosecuting War Crimes at the Hague Tribunal*. Chicago: University of Chicago Press.
Hagan, John, and Ron Levi. 2004. "Social Skill, the Milosevic Indictment, and the Rebirth of International Criminal Justice," *European Journal of Criminology* 1: 445–475.
Hagan, John, Ron Levi, and Gabrielle Ferrales. 2006. "Swaying the Hand of Justice: The Internal and External Dynamics of Regime Change at the International Criminal Tribunal for the Former Yugoslavia," *Law & Social Inquiry* 31: 585–616.
Kennedy, David. 2004. *The Dark Sides of Virtue: Reassessing International Humanitarianism*. Princeton, NJ: Princeton University Press.
Koskenniemi, Martti. 2002. "'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law," *Modern Law Review* 65: 159–171.

Latour, Bruno. 2005. *Reassembling the Social: An Introduction to Actor-Network-Theory*. Oxford: Oxford University Press.
Minow, Martha. 1998. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston, MA: Beacon.
Rajagopal, Balakrishnan. 2003. *International Law from Below: Development, Social Movements and Third World Resistance*. Cambridge: Cambridge University Press.
Riles, Annelise. 2000. *The Network Inside Out*. Ann Arbor, MI: University of Michigan Press.
Riles, Annelise. 2006. "Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage," *American Anthropologist* 108: 52–651.
Scheppele, Kim. 2006. "The Metastasis of Torture: Circulating Coerced Information in the Anti-Terror Campaign." Paper presented at the American Sociological Association Annual Meeting, Montreal, Canada, August.
Schwendinger, Herman, and Julia Schwendinger. 1975. "Defenders of Order or Guardians of Human Rights?" In Ian Taylor, Paul Walton and Jock Young (eds.), *Critical Criminology*: pp. 113–146. Boston: Routledge & Kegan Paul.
Sewell, William. 1992. "A Theory of Structure: Duality, Agency, and Transformation," *American Journal of Sociology* 98: 1–29.
Sugarman, David. 2002. "From Unimaginable to Possible: Spain, Pinochet and the Judicialization of Power," *Journal of Spanish Cultural Studies* 3: 107–124.
Sutherland, Edwin. 1949. *White Collar Crime*. New York: Dryden.
Swidler, Ann. 2001. *Talk of Love: How Culture Matters*. Chicago: University of Chicago Press.
Valverde, Mariana. 2005. "Authorizing the Production of Urban Moral Order: Appellate Courts and Their Knowledge Games," *Law & Society Review* 39: 419–456.
Wacquant, Loïc (ed.). 2005. *Pierre Bourdieu and Democratic Politics*. Cambridge, UK: Polity.