

9-1-2010

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Recommended Citation

Bloch, Kate E. (2010) "Mr. Pendleton's Rainbows: On the Value of Teaching Abroad," *Penn State International Law Review*: Vol. 29: No. 2, Article 3.

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Mr. Pendleton's Rainbows: On the Value of Teaching Abroad

Kate E. Bloch*

It was the first day of class. A Department of Justice graph depicting the number of executions performed each year in the United States plastered the white screen at the front of the room. The hills and valleys of the graph flatlined to zero for a number of years in the 1970s. I asked, offhandedly, if anyone in the room could explain why. A student raised her hand and, to my surprise, gave a highly accurate and lucid discussion of the U.S. Supreme Court's reasoning in *Furman v. Georgia*,¹ the case in which the Court had indeed ruled that capital punishment as imposed was unconstitutional.

My surprise didn't stem from the fact that it was the first day of class and there'd been no pre-class reading assignment and we hadn't studied *Furman*, or, well, really anything much yet. Instead, I was surprised because the classroom in which I stood was in the Netherlands. I was surprised because I was teaching an introductory comparative criminal justice course, at the undergraduate level, in a Dutch law school, in English.² The student who had provided the eloquent account of the Court's reasoning was herself from Hungary.

I would have been impressed by the student's response had it arrived in a U.S. law school classroom, all the more so had it been in a first-year or introductory course. But to an even greater extent, I think

* © Kate E. Bloch, Professor of Law, University of California, Hastings College of the Law. I am grateful to my colleagues who provided valuable insights on earlier drafts of this essay, including Margreth Barrett, Bill Dodge, Pauline Memelink, F. Pinar Ölçer, Lois Weithorn, and Frank Wu, to my home institution for the gift of my time teaching abroad, and to all the welcoming colleagues, administrators, and students at Leiden University.

1. *Furman v. Georgia*, 408 U.S. 238 (1972).

2. I should add that some of the students, particularly students from countries outside of the Netherlands, had backgrounds in legal studies from educational institutions in those countries. Moreover, "undergraduate level" is a relative term in this context. Although this course was offered as a choice in the curriculum of a first-degree program post high school, like a bachelor's degree in the U.S., completion of the Dutch degree may enable students to practice law in the Netherlands.

that my surprise reflected and resulted from my own naiveté. Beyond knowing that Hungary didn't have capital punishment, I couldn't have explained when and why Hungary had rejected the death penalty. In fact, the primary reason I could furnish information on the Dutch rejection of the death penalty was because I had researched that information in anticipation of teaching this comparative justice course.

As must be apparent, comparative and international law were not areas with which I had much familiarity before my experience preparing to and teaching in the Netherlands.³ But, I had been asked by my host institution to teach a comparative course. So, with some hesitation about my ability to learn enough about Dutch law to stay on a par with, or, if I were lucky, a class ahead of, my students, I sought to comply and teach the course with at least some comparative dimensions.

That moment on the first day of class when the student responded to my inquiry about the graph and others like it gave me an understanding of the gift that my home institution had given me of my time teaching abroad. These moments convinced me that teaching legal studies, outside the country in which one has historically taught, can be of extraordinary value. In this essay, I aim to share a bit about my experience in the Netherlands in hopes of encouraging those domestic legal academics, who have yet to take the risk to, at least, consider if not, well, *carpe diem*.⁴

In addition to my naiveté about how conversant my students might be with U.S. doctrine, I suffered from other limitations with respect to this enterprise of teaching in the Netherlands. I was not literate in and did not speak Dutch. Fortunately, the Dutch population is impressively multilingual, and English is a studied and commonly spoken second language. In my months visiting the Netherlands, I encountered so few adult Dutch natives who were unable to speak English that I can still count their number on my fingers. The Dutch embrace of English also benefited me in terms of several very useful written resources about the

3. This is particularly true of comparative and international law in continental Europe. I had had the opportunity to learn a bit about the criminal justice system in Haiti, where I had the privilege of teaching through the Hastings-to-Haiti partnership at L'École Supérieure Catholique de Droit de Jérémie (ESCDROJ), a law school located in Jeremie, Haiti, in March 2009.

4. This essay is not, of course, the first to laud the importance or value of teaching abroad. I hope simply to extend the existing canon of literature on this topic by sharing my experiences here. See, e.g., Katalin Kolláth and Robert Laurence, *Teaching Abroad: Or, "What Would That Be in Hungarian?"* 43 J. LEGAL EDUC. 85, 85 (1993) (essay providing advice "for those who want to think and plan a bit about what their jobs will be and how the teaching should be done" and particularly emphasizing the value of team teaching.).

Dutch legal system that were available in English.⁵ Even the highly informative written resources I had consulted were, however, not always sufficient to save me from embarrassment in the classroom. This is because there was another area in which I lacked proficiency. Although I had read that European Court of Human Rights decisions influenced Dutch law,⁶ I had not grasped the scope and significance of that influence.

As a domestic U.S. legal academic, I have been acculturated to the largely internal focus for U.S. legal decision-making. For example, in 2008, the U.S. Supreme Court declined to require state courts to follow an International Court of Justice (ICJ) ruling in a case to which the United States had been a party and where the United States had consented to the jurisdiction of the ICJ by ratifying the Optional Protocol of the Vienna Convention.⁷ The U.S. Supreme Court noted that “Article 94(1) [of the U.N. Charter] provides that ‘[e]ach Member of the United Nations *undertakes to comply* with the decision of the [ICJ] in any case to which it is a party.’ 59 Stat. 1051.”⁸ But the Court decided “that the phrase ‘undertakes to comply’ is not ‘an acknowledgement that an ICJ decision will have immediate legal effect in the courts of U.N. members,’ but rather ‘a *commitment* on the part of U.N. members to take *future* action through their political branches to comply with an ICJ decision.”⁹

5. See, e.g., P.J.P. TAK, *THE DUTCH CRIMINAL JUSTICE SYSTEM* (2008); ERHARD BLANKENBURG AND FREEK BRUINSMA, *DUTCH LEGAL CULTURE* (2d ed. 1994); FAQ Euthanasia 2010, MINISTRY OF FOREIGN AFFAIRS, available at http://www.minbuza.nl/en/You_and_the_Netherlands/About_the_Netherlands/Ethical_issues/FAQ_Euthanasia (last visited Dec. 3, 2010); Search Results: Peter Tak, MINISTRY OF SECURITY AND JUSTICE, available at <http://english.wodc.nl/> (Search “Peter Tak,” Follow “ob205 full text - ob205 full text”) (last visited Dec. 3, 2010). Resources in English were, of course, only a fraction of the resources that I might have been able to consult had I been literate in Dutch.

6. A primary resource I had consulted on Dutch law had, upon further review, been rather explicit about the relationship of instruments of international human rights and Dutch law. Tak, Search Results: Peter Tak, MINISTRY OF SECURITY AND JUSTICE, available at <http://english.wodc.nl/> (Search “Peter Tak,” Follow “ob205 full text - ob205 full text”) (last visited Dec. 3, 2010), *supra* note 5, at 21–22; see also *infra* note 21.

7. *Medellin v. Texas*, 552 U.S. 491 (2008).

8. *Medellin* at 508 (quoting U.N. Charter art. 94, para. 1 (emphasis added by U.S. Supreme Court)).

9. *Medellin* at 508 (quoting Brief for United States as *Amicus Curiae* Supporting Respondent at 34, *Medellin v. Dretke*, 544 U.S. 660 (2005) (*Medellin I*) (No. 04-5928), 2005 U.S. LEXIS 4344). The Court explained: “[W]hile treaties ‘may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be “self-executing” and is ratified on these terms.’” *Medellin* at 505 (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc) (Boudin, C. J.) (footnote omitted)). The Court did not find that the treaty conveyed an intention that it be self-

And subsequent to the ICJ decision at issue,¹⁰ “the United States gave notice of [its] withdrawal from the Optional Protocol to the Vienna Convention.”¹¹

Consequently, in preparing to teach this course comparing U.S. and Dutch approaches to criminal justice, I researched Dutch criminal law and procedure.¹² I planned to compare *Miranda*¹³ with the Dutch approach to the question of counsel during the initial police interrogation. A book on Dutch criminal justice, published in 2008, explained that, in the Netherlands, the accused was not entitled to counsel during the initial substantive police interrogation.¹⁴ This Dutch approach was to provide a vivid contrast with the U.S. right to counsel at the initial police interrogation and the admonishments about counsel required by *Miranda*.¹⁵ However, because I had not appreciated the

executing nor did it find that Congress had enacted implementing statutes regarding the issue. *Medellin* at 506-11.

10. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

11. *Medellin* at 500 (citing Letter from Condoleezza Rice, Sec’y of State, to Kofi A. Annan, Sec’y-Gen. of the U.N.).

12. Of course, my research was constrained by my inability to read Dutch.

13. *Miranda v. Arizona*, 384 U.S. 436 (1966).

14. TAK, THE DUTCH CRIMINAL JUSTICE SYSTEM, *supra* note 5, at 92. Apart from during a “verification interrogation,” in which the “police officer must ensure that the right person has been arrested, that the arrest was lawful, and that continuation of the arrest seems necessary,” the arrestee did not have the right to have defense counsel present during this initial police interrogation. TAK, THE DUTCH CRIMINAL JUSTICE SYSTEM, *supra* note 5, at 92.

The police arrest may last up to six hours, not including the hours between midnight and nine a.m. during which the detainee can be further interrogated about the crime allegedly committed by him. . . . In this interrogation the suspect has no right to assistance by defense counsel. A defense counsel is not yet assigned to him. The client can see a counsel of his own choosing after this questioning.

TAK, THE DUTCH CRIMINAL JUSTICE SYSTEM, *supra* note 5, at 92. The publication I had consulted about police interrogation in the Netherlands appears to have pre-dated the relatively recent European Court of Human Rights Grand Chamber ruling in *Salduz v. Turkey* (*Salduz v. Turkey*, no. 36391/02 (November 2008), The Collections, EUROPEAN COURT OF HUMAN RIGHTS, *available at* <http://www.echr.coe.int/ECHR/EN/hudoc> (follow “HUDOC Database” hyperlink; then search “Salduz” under “Case Title”; then follow “1. CASE OF SALDUZ v. TURKEY” hyperlink) (last visited Dec. 3, 2010)).

15. Although the right of a suspect to have counsel present during police interrogation in the U.S. remains perhaps undiluted, the clarity with which police must explain that right to a suspect in *Miranda* warnings prior to interrogation has been the subject of recent U.S. Supreme Court treatment and, arguably, dilution. See *Florida v. Powell*, 130 S. Ct. 1195, 1200 (2010) (finding that the following *Miranda* warnings sufficiently apprised a suspect of his right to have counsel with him during the police interrogation:

You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a

impact that decisions, which were rendered by a non-Dutch court in cases in which the Netherlands was not a party, had on Dutch domestic criminal procedure, I had not focused on relatively recent rulings against Turkey by the European Court of Human Rights in Strasbourg, France.¹⁶

Coincidentally, and in time to save me some embarrassment, a colleague described her in-progress scholarship.¹⁷ She was working on a study of relatively recent European Court of Human Rights decisions, including *Salduz v. Turkey*.¹⁸ In *Salduz*, the European Court of Human Rights decided that Turkey's failure to provide access to counsel for the accused at the initial police interrogation stage (and its use of his statement made during that interrogation to convict him) constituted a

lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.)

16. During 2009 and in 2010, following the initial ruling against Turkey (*Salduz*), the European Court of Human Rights has issued, in quick succession, a substantial number of rulings on the access to counsel issue against Turkey as well as a few rulings on those grounds against other countries, although none appears to have been against the Netherlands, at least as of March 3, 2010. *Salduz v. Turkey*, no. 36391/02 (November 2008), The Collections, EUROPEAN COURT OF HUMAN RIGHTS, available at <http://www.echr.coe.int/ECHR/EN/hudoc> (follow "HUDOC Database" hyperlink; then search "Salduz" under "Case Title"; then follow "1. CASE OF SALDUZ v. TURKEY" hyperlink) (last visited Dec. 3, 2010); F. Pinar Ölçer, Truth or Due Process? The Use of Illegally Obtained Evidence in the Criminal Trial in ECHR Law 49-50 (July 25 - Aug. 1, 2010) (unpublished manuscript) (on file with the PENN STATE INTERNATIONAL LAW REVIEW) [hereinafter *Truth or Due Process*]; see also E-mail from Dr. F. Pinar Ölçer, to author, (July 23, 2010, 5:57 PST) (on file with author). One of the important decisions in the *Salduz* line of cases is *Panovits v. Cyprus*, (*Panovits v. Cyprus*, Application no. 4268/04, December 11, 2008) The Collections, EUROPEAN COURT OF HUMAN RIGHTS, available at <http://www.echr.coe.int/ECHR/EN/hudoc> (follow "HUDOC Database" hyperlink; then search "Panovits" under "Case Title"; then follow "1. CASE OF PANOVITS v. CYPRUS" hyperlink) (last visited Dec. 3, 2010), a case involving the rights of a minor to have access to counsel at the initial police interrogation. There the Court found

that the lack of provision of sufficient information on the applicant's right to consult a lawyer before his questioning by the police, especially given the fact that he was a minor at the time and not assisted by his guardian during the questioning, constituted a breach of the applicant's defence rights. The Court moreover finds that neither the applicant nor his father acting on behalf of the applicant had waived the applicant's right to receive legal representation prior to his interrogation in an explicit and unequivocal manner.

Panovits ¶ 73. The Court concluded "that there has been a violation of Article 6 of the Convention because of the use in trial of the applicant's confession obtained in circumstances which breached his rights to due process and thus irreparably undermined his rights of defence." *Panovits* ¶ 86.

17. *Truth or Due Process*, *supra* note 16.

18. *Salduz v. Turkey*, no. 36391/02 (November 2008), The Collections, EUROPEAN COURT OF HUMAN RIGHTS, available at <http://www.echr.coe.int/ECHR/EN/hudoc> (follow "HUDOC Database" hyperlink; then search "Salduz" under "Case Title"; then follow "1. CASE OF SALDUZ v. TURKEY" hyperlink) (last visited Dec. 3, 2010).

violation of the Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁹ The Court found that the Convention “requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police. . . .”²⁰

Equally importantly, I came to understand that, based upon the relationship between the European Court of Human Rights and Dutch law, Dutch law would be expected to conform to the requirements of *Salduz*, even though the Netherlands had not been a party in the *Salduz* case.²¹ Precisely what those requirements are, however, has engendered

19. *Id.* ¶¶ 56-63. Turkey had not provided access to counsel for Mr. Salduz at the initial police interrogation and “his statement to the police was used for his conviction.” *Id.* ¶ 58. Subsequent to the events in *Salduz*, but before the *Salduz* decision, Turkey had already amended its law to provide for access to counsel at the initial interrogation stage. *Id.* ¶ 30.

20. Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently “practical and effective.” . . . Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction—whatever its justification—must not unduly prejudice the rights of the accused under Article 6 . . . (see, *mutatis mutandis*, *Magee*, cited above, § 44). The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

Id. § 55.

21. TAK, THE DUTCH CRIMINAL JUSTICE SYSTEM, *supra* note 5, at 34-35; P.J.P. Tak, *The Dutch Criminal Justice System: Organization and Operation* WODC, (2nd ed. 2003) available at http://english.wodc.nl/images/ob205_full%20text_tcm45-57899.pdf, at 21-22 (last visited Dec. 3, 2010) (stating that “[T]he Dutch Constitution obliges courts to review all domestic legislation, including Acts of Parliament, with regard to their compatibility with directly applicable provisions of international treaties to which the Netherlands are a contracting party, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950.

All provisions in this Convention that do not need further legislative implementation or operationalization are regarded as directly applicable. Where a Dutch statutory provision is found to be in conflict with a directly applicable provision of the Convention, the court must apply the provision of the Convention instead of the national provision. . . . Standards on the application of directly applicable provisions of the Convention elaborated in case-law by the European Court of Human Rights (ECHR) in Strasbourg must also be applied by Dutch courts. This is not only the case with regard to ECHR decisions ruled against the Netherlands, but also with regard to decisions ruled against other Member-States of the Council of Europe, in as far as these decisions contain standards regarding the provisions of the Convention. This means that apart from decisions against the Netherlands, other decisions of the court also have an impact on Dutch criminal procedural legislation and trial practice.”); see also *Truth or Due Process*, *supra* note 16, at 2 (noting that, “[a]t the very least, member states whose legal systems do not provide for legal assistance in the early stages of police custody at all, will presumably have to seriously reconsider that position.”).

some discussion in the Netherlands.²² It also appears that new legislation may need to be enacted in order to officially conform Dutch law to those requirements, as those requirements are interpreted by the Netherlands.²³ In the interim, in April 2010, a prosecutorial guideline came into effect designed to provide access for a consultation with counsel by the accused before, although apparently not during, the initial substantive interrogation.²⁴

As a result of my much improved understanding of the significance of *Salduz*, I undertook to reconfigure the relevant portion of my class presentation to address the anticipated impact of *Salduz* and its progeny on Dutch law and thanked my lucky stars and my informative colleague for saving me from an awkward and embarrassing class session. (As you already know from earlier paragraphs, my students were exceptionally bright and informed. I don't think the *Salduz* decision or its implications for Dutch domestic criminal procedure would have escaped their notice.) The scene I've narrated echoed in various forms throughout my time

22. There apparently remains some debate about the scope of the requirements in *Salduz*. A Dutch Report to the XVIIIth International Congress of Comparative Law in the summer of 2010 indicates that the meaning of the language in *Salduz*, that "access to a lawyer should be provided as from the first interrogation of a suspect by the police" . . . is not immediately clear." Matthias J. Borgers & Lonneke Stevens, *The Use of Illegally Gathered Evidence in the Dutch Criminal Trial* (VU University Amsterdam, Working Paper, July 15, 2010) at 16, available at <http://ssrn.com/abstract=1640487>. The Dutch Report explains: "The bar in particular states that the judgments should be interpreted to mean that lawyers have a right to be present during police interrogations, which would be a reversal of the existing case law of the ECHR in which this right is not explicitly recognized. The Dutch Minister of Justice and Supreme Court, however, do not want to go that far." *Id.* (footnote omitted). Consequently, Dutch law conformance with the requirements of *Salduz* may mean that, as a general principle, the adult accused will only have access to counsel for a consultation prior to the interrogation, rather than access throughout the interrogation. *Id.*; E-mail from Dr. F. Pinar Ölçer, *supra* note 16. Two Dutch Supreme Court cases, in particular, appear to have interpreted *Salduz* and its progeny to require access to counsel for a suspect prior to initial police interrogation. E-mail from Dr. Pauline Memelink, to author, (Aug. 25, 2010, 12:04 PM PST) (on file with author) (citing HR 1 juni 2010, NJ 2010, LJN BM6231 (Neth.), HR 30 juni 2009, NJ 2009, 349 m.nt. (Neth.)). In the June 1, 2010 decision, the Dutch Supreme Court apparently excluded evidence taken without such consultation. E-mail from Dr. Pauline Memelink, to author, (Aug. 25, 2010, 12:04 PM PST) (on file with author).

23. E-mail from Dr. F. Pinar Ölçer, *supra* note 16. New legislation relating to the issue of access to counsel and initial police interrogations was pending in the Netherlands as of the summer of 2010. *Id.* And a prosecutorial guideline, which is available in Dutch, had been issued about access to counsel and initial police interrogations as a temporary measure. *Id.*; See Stcrt. 2010 4003, 1-7 (16 Mar. 2010). These may, however, not provide access to counsel throughout the interrogation for an adult suspect, but rather access for a consultation prior to the interrogation. A right of access to counsel prior to interrogation and a responsibility that law enforcement inform the suspect of this right appear to have been accepted by both the Dutch Minister of Justice and the Dutch Supreme Court. Borgers & Stevens, *supra* note 22, at 16.

24. See *supra* notes 22-23.

teaching in the Netherlands, with kind colleagues pointing me to critical resources, explaining legal policy or approaches, and generally helping me to understand facets of the Dutch legal system. Launching oneself as a law school academic into an unfamiliar legal culture is reasonably likely to produce some “disorienting moments.”²⁵ But it was often these “disorienting moments” that I found generated the most significant opportunities for collegial camaraderie and for growth.

Learning about the Dutch system also sparked those healthy questions of transposing ideas from theirs to ours. Two examples spring to mind. First, U.S. courts, legislatures, and legal scholars have wrestled with how to define the crime of attempt for many decades.²⁶ Much of the debate has revolved around where to draw the line between preparation and attempt.²⁷ The traditional doctrine of attempt law in the U.S. relegates preparation to the land of the unindictable and noncriminal.²⁸ But once the accused’s conduct²⁹ crosses the magic line between preparation and attempt, the behavior becomes criminal as an attempt and subject to prosecution. Deciding where to ink that line is often a function of compromises among conflicting policies.³⁰ For example, one policy promotes the need to allow law enforcement to intervene early enough to prevent the target crime.³¹ Another cautions against intervening too early and punishing persons who might voluntarily desist and not actually carry through with what might have been “barely formed criminal” inclinations.³² In U.S. legal doctrine on attempt, generally, the result is binary; it’s either the crime of attempt with its

25. See Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 51-56 (1995) (for a discussion of the adult learning theory involving “disorienting moments” in the legal academic clinical setting).

26. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 406 (4th ed. 2006).

27. DRESSLER, *supra* note 26, at 423.

28. *Id.* See, however, WAYNE R. LAFAVE, CRIMINAL LAW 537-38 (3d ed. 2000) (footnotes omitted) (noting that, “prosecution for attempt is only one of several ways in which the criminal law can reach conduct merely tending toward the doing of some harm otherwise proscribed by law. The crimes of assault and burglary, which served as a means of dealing with the most common forms of attempt prior to recognition of attempt as a distinct crime, are still very much with us. In addition, even the most modern codes include crimes defined in terms of conduct which is arguably of itself harmless but which is made criminal because it is (or is very likely to be) a step toward the doing of harm. For example, one modern code includes not only a host of possession-type crimes (e.g., . . . possession of burglary tools with intent to commit a burglary, . . . possession of weapons with intent to use same against another unlawfully . . .), but also other substantive offenses defined in terms of using certain items for a particular purpose . . . or even being in a certain place for a bad purpose.”).

29. Together with the requisite mental state.

30. DRESSLER, *supra* note 26, at 407, 423.

31. *Id.*

32. *Id.*

attendant criminal penalties or just preparatory behavior and not subject to criminal liability under attempt law.³³

But, the Dutch have another solution. In addition to attempt, the Dutch have a crime of “preparation.”³⁴ In the Dutch code, attempt can incur two-thirds the penalty of the target crime, while preparation is generally only subject to half.³⁵ Having a crime of preparation authorizes police intervention and arrest to prevent the perpetration of serious offenses at what may be a much earlier stage than would traditional attempt doctrine. But a reduced penalty limits the consequences for the accused when police intervene early in the chain of conduct that may lead to the target crime. In highlighting the Dutch approach, I do not mean to suggest that it could or should be transposed wholesale into the U.S. system. Instead, I suggest that the Dutch approach, which has now been in effect for more than a decade, may deserve greater attention and analysis by legal scholars and legislatures in the U.S. At a minimum, knowing about the Dutch approach, not just a theoretical option, but an approach in use, can inform my teaching and understanding of the range of options available in legal systems to deal with the thorny question of when or how to address preparation, attempt or attempt-like behavior.

Similarly, the Dutch have a defense of excessive self-defense. Their Criminal Code defines this excuse defense as: ““Anyone exceeding the limits of necessary defense, where such excess has been the direct result of a strong emotion brought about by the attack, is not criminally

33. See, however, LAFAVE, *supra* note 28, describing examples of specific crimes that may reach preparatory behavior.

34. TAK, THE DUTCH CRIMINAL JUSTICE SYSTEM, *supra* note 5, at 76. The Dutch formally defined the crime of preparation in 1994. *Id.* It is limited to preparation of serious crimes. *Id.* In a published English translation from 1997, Article 46 defined Preparation as follows:

Preparation to commit a serious offense which, by statutory definition, carries a term of imprisonment of not less than eight years, is punishable, where the perpetrator intentionally obtains, manufactures, imports, transits, exports or has at his disposal, objects, substances, monies or other instruments of payment, information carriers, concealed spaces or means of transport clearly intended for the joint commission of the serious offense.

The Dutch Penal Code in 30 THE AMERICAN SERIES OF FOREIGN PENAL CODES. 75 (Louise Rayar and Stafford Wadsworth et. al., trans., rev. by Hans Lensing, Fred B. Rothman & Co. 1997). A 2008 article notes that amendments subsequent to 1994 have modified the offense somewhat, including removing the requirement of an intention for a joint commission. Caroline M. Pelsler, *Preparations to Commit a Crime: The Dutch Approach to Inchoate Offences*, 4 UTRECHT L. REV. 57, 65 (2008) (addressing the “removal of the requirement that the intended crime would be committed together with others” and more generally providing a detailed discussion of the Dutch approach to inchoate crimes).

35. TAK, THE DUTCH CRIMINAL JUSTICE SYSTEM, *supra* note 5, at 76 (for a crime carrying a life sentence, preparation reduces the punishment to fifteen years).

liable.”³⁶ “When the unlawful attack causes strong emotions such as rage, anger, fear or desperation, the person attacked may not react properly by using a reasonable mode of escape.”³⁷ I could not help but wonder how this defense might be applied in the context of some domestic violence cases, particularly when the terrified accused has been the victim of domestic violence by the deceased and uses a knife or gun against the deceased’s hands or fists, a circumstance that might be perceived in some contexts as an excessive response.³⁸ What might be the consequences of this doctrine? Could this doctrine provide insight or guidance in the U.S. struggle with some domestic violence cases? What implications might it have if applied in other self-defense-related contexts?

To quote the old commercial, these insights about the Dutch criminal justice system sometimes represented for me “I should have had a V8” moments. I could only imagine how much more there was for a domestic U.S. legal academic to learn from the Dutch system. But even this limited learning about the Dutch system produced that delightful sensation of stretching professionally, making new connections, and encouraging rusty synapses to fire anew.

Having the opportunity to teach abroad shouldn’t of course just be about what we gain from the experience, but also what we give. What

36. P.J.P. Tak, *The Dutch Criminal Justice System: Organization and Operation* WODC, (2nd ed. 2003), at 45 available at http://english.wodc.nl/images/ob205_full%20text_tcm45-57899.pdf (quoting Section 41(2) of the Dutch Criminal Code) (last visited Dec. 3, 2010).

37. *Id.* at 45. Excessive self-defense in the Dutch system is a complete excuse defense. *Id.* If successfully invoked, the actor is exonerated. *Id.* This approach furnishes an interesting comparison to the potential mitigation, rather than exoneration, of imperfect self-defense in the U.S., in which some courts allow a mitigation of murder to a lesser degree or form of homicide where, for instance, an actor possesses an honest but unreasonable belief in the need for force or the particular degree of force used. DRESSLER, *supra* note 26, at 249; LAFAVE, *supra* note 28, at 494. A comparison of excessive self-defense to the U.S. approach to the provocation mitigation in homicide might also be worth further investigation. For a discussion of provocation and self-defense in various legal systems, including provocation and excessive self-defense in the Dutch system, see René Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL’Y 331 (2006) [hereinafter *Proportionality in Self-Defense Law*]. See DRESSLER, *supra* note 26, at 571-90 (for a discussion of the provocation mitigation in the U.S.).

38. See generally Lerner, *supra* note 37 (for an analysis of efforts to modify or eliminate proportionality in self-defense law in a number of locations around the world). The *Proportionality in Self-Defense Law* article uses the Dutch excessive self-defense approach as an example of an approach in which proportionality has been modified or eliminated. The article is primarily focused on proportionality issues in the context of self-defense against intruders into one’s dwelling or vehicle, e.g., shooting of burglars intruding into one’s home. But, the article does make some reference to abusive situations.

we might bring will depend upon who we are and what our hosts might find useful. In the criminal law/criminology department in which I found myself, my colleagues expressed particular interest in U.S. plea bargaining and publishing in U.S. law journals.

With respect to plea bargaining, to the extent that it involves an accused pleading guilty to a criminal charge in a court proceeding in exchange for possible concessions by the prosecution, to my knowledge, it doesn't exist in the Dutch system.³⁹ As I understand the process, the accused simply does not plead guilty in the Dutch criminal justice court system, period.⁴⁰ The Dutch do have transactions.⁴¹ Transactions may be understood as a "form of diversion."⁴² They generally involve financial resolutions in which the accused makes some payment or perhaps undergoes training or does work without remuneration in lieu of further prosecutorial pursuit of a case.⁴³ Transactions are at the discretion of the prosecutor, do not "imply that the offender admits he has committed a criminal offense,"⁴⁴ do not appear to include incarceration as a possible condition, and do not appear to anticipate judicial approval or involvement.⁴⁵ Dutch and U.S. approaches to case resolution differ in significant respects. So, with pleasure at being able to give something back for all the guidance and information my

39. The Dutch trial system is much more streamlined than ours. Their traditional criminal justice system involves bench rather than jury trials. They admit most hearsay, which commonly enables presentation of cases substantially reliant on a police file that contains sworn accounts of witness statements. TAK, THE DUTCH CRIMINAL JUSTICE SYSTEM, *supra* note 5, at 101. It's also possible that alternative mechanisms of case resolution help manage the caseload.

40. The accused in the Netherlands can, of course, as in the U.S., confess to committing the crime to the police and/or during the court trial. *Id.* Such a confession may serve as evidence of guilt in the accused's trial in the Netherlands. *Id.*

41. TAK, THE DUTCH CRIMINAL JUSTICE SYSTEM, *supra* note 5, at 87-88. A critique of transactions, particularly of the 1983 expansion in the scope of cases in which the prosecution can pursue a transaction, suggests that transactions "introduced" a system of plea bargaining. *Id.* at 88. But transactions do appear to differ from plea bargaining as practiced in many courts in the U.S., in part, as described in the text above. In addition, a transaction is "not registered in the criminal record." *Id.* at 88.

42. *Id.* at 87.

43. *Id.*

44. *Id.* at 88.

45. *Id.* at 88. The Dutch also recently instituted another option for prosecutors in certain cases, called a penal order. *Id.* at 89. Using this, a prosecutor may actually impose an order and/or sentence, without a court adjudication. *Id.* The sentences and/or orders, however, appear limited to options like compulsory work service or training courses, fines, and probationary periods with designated instructions requiring compliance. *Id.* The sentences and orders do not appear to include incarceration as an option. *Id.* The alleged offender may object to the penal order. Such an objection triggers a court trial. *Id.* at 89.

colleagues had furnished, I offered a lunchtime discussion/question and answer on plea bargaining in the U.S. criminal justice system.

Of perhaps more long-term significance for my colleagues' careers as academics, I also offered a presentation on publishing in U.S. law journals. Quite by chance, I learned from a colleague in the Economics department at the University in the Netherlands that the process of submitting to and publishing in U.S. legal journals was likely to be an unfamiliar one to my Dutch colleagues. I came to understand that, as a general rule, my Dutch colleagues submitted to peer-reviewed journals in Europe. They could and did write scholarly articles in English, but many were substantially or entirely unfamiliar with the submission process and options for hundreds of U.S. legal journals that might supply a venue for their scholarly endeavors. I cross my fingers and now look forward to reading their work in the pages of familiar U.S. legal journals.

Why else might you take the risk and uproot yourself from the comforts of your home institution and the U.S. legal system? For me, the answer rests finally in my students' investment in their learning and the pride, for example, they took in conducting and participating in a U.S. style jury trial in the last class. We played by U.S. evidentiary principles and the trial entailed opening and closing statements, direct and cross examination, as well as objections. To my knowledge, only one of my students was from the U.S. and spoke English as a first language. For my Dutch students, English was probably a second language. For the remainder of my international students—my student from St. Petersburg, and those from Germany, Hungary, and France—English might have been a second, third or fourth language. For many of my students, coming from civil law, inquisitorial systems, much of the U.S. adversarial process was, or at least had been, relatively foreign.

I sat in awe as they spoke to our jurors in opening statement, with the prosecution telling a wonderful narrative of the events of the incident and one of the defense counsel explaining what a privilege it was to represent his client at a moment of historic importance in his client's life. The witnesses had learned their roles and played them with sincerity. The questioning was artfully constructed and impressively executed. The objections were, on the whole, strikingly appropriate. The closings were so persuasive that, despite a relatively extensive period of deliberations, the jury ultimately hung, unable to resolve the question of the guilt or innocence of the accused.

I had set the mock crime scene across the canal from the law school, under a weeping willow tree, with the eyewitness' vantage point in front of the law school and potentially obscured by the low hanging branches of the willow across the water. In the penultimate class, on an overcast afternoon, we had gone to investigate the scene (as I believe all good

lawyers should, if possible). One student had queried whether the lighting might have been different at the time of the event since the event had occurred at approximately 2:45 a.m. I had responded affirmatively and we had located various lampposts that might have been illuminated at the time of the event. But, among the many images I carry away from the last day of class is the one of the photograph, taken by a prosecution team member, who had trekked out in anticipation of the trial on a night or early morning preceding the trial, when the lampposts were lit, of the scene across the canal as it might really have looked on the night of the incident in question. These were students with heart, students whose attitude towards learning makes the jet lag and all the other adjustments, which international travel and teaching often require, *so* worth it.

In the children's story, *Pollyanna*,⁴⁶ the title character visits her neighbor, the somewhat inwardly focused⁴⁷ Mr. Pendleton.⁴⁸ With his assistance, Pollyanna discovers that his candelabra is hung with crystals that have a prismatic effect. She delights in the multitude of rainbows that the crystals create all over the room. Over time, Mr. Pendleton too comes to see the world through the perspective of the light-filled prisms and the rainbows that enchant Pollyanna. Teaching abroad was, for me, like opening the curtains and letting the light fill the prisms. I wish the same for you.

46. See generally ELEANOR H. PORTER, *POLLYANNA* (L.C. Page and Company Publishers 1913).

47. Although Mr. Pendleton does travel.

48. In the original book, the neighbor's name is Mr. Pendleton. But, he is probably better known by the Disney movie version of his name, Mr. Pendergast.

