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Beyond Thinking Like a Lawyer

Providing a Space for Perpetrator Studies within the Legal Classroom

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In general, the legal classroom approaches perpetrators of mass killings, political violence, and genocide from a formalized set of rules centered on a judicial process. Law students learn not only about establishing that a crime has occurred, but also about holding the wrongdoer criminally (or sometimes civilly) accountable. Principles of liability, or theories of perpetration, provide the ways through which a court of law can find a person responsible for the crimes committed. Law students will learn all about the formal categorizations, including, for instance, direct or indirect perpetration, aiding and abetting, and command responsibility. A law student will also learn about defenses available to an accused, defenses that provide grounds for excluding responsibility, such as mental incapacity, self-defense, or duress, as well as mitigating or aggravating factors that go towards sentencing and punishment. Students learn all of these concepts by delving into primary legal sources, including treaties, legislation, and case law. They may supplement these sources by studying legal scholarship, but very little room—if any—is allocated for non-legal texts. As a result, when teaching about perpetrators of mass crimes in a legal setting, reliance on interdisciplinary sources or delving into broader discussions about perpetrators are minimal. In this regard, the legal classroom has a lot to learn from the interdisciplinary field of Perpetrator Studies, and thankfully, important steps are being taken by educators who want to broaden the idea of what it means to "think like a lawyer."

"Thinking Like a Lawyer": Emotional Detachment

When students choose the study of law, they are often reminded that their studies are training them to "think like a lawyer" because of the underlying belief amongst law professors and law practitioners that lawyers somehow think differently than the average person. But what does "thinking like a lawyer" really mean? There are countless journal articles, editorials, and blogposts dedicated to this question (Vandervelde 1996; Rapoport 2002; Natt Gantt 2007). They are similar in that they almost all stress analytical rigor, logical reasoning, and the ability to recognize and draw distinctions. They also emphasize an ability to persuasively advocate various sides of an issue, whether or not one agrees with or believes in the position one is advancing. Very often:

> [t]o "think like a lawyer" means adopting an emotionally remote, morally neutral approach to human problems and social issues; distancing oneself from the feelings and suffering of others; avoiding emotional engagement with clients and their causes; and withholding moral judgment. To think like a lawyer one must be dispassionate in analyzing a client's legal problems and options, and in developing a legal strategy for achieving the client's goals.
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> *(Wizner 1998: 587)*

Accordingly, what often happens in the traditional classroom is an emphasis on formalistic legal rules, legal sources, remaining "emotionally remote," and adopting a "neutral approach to human problems and social issues." When teaching about perpetrators of mass crimes or serious criminality, discussions that fall outside the formal legal setting, for instance about broader ethical questions or contextual structures of inequalities, get sidelined. Because motive (the motivation behind a criminal act) is immaterial to liability, questions of why perpetrators did what they did are usually only important for purposes of sentencing. Attempts to better understand the perpetrator's background, wider issues surrounding the crime, or structural societal factors are simply not the focus. Rather, the focus is on the intent, or the mental state, of the suspect, which, unlike motive, is an element of the crime. To help clarify: many people may have motive to commit a crime, but for the most part, only the individual who possesses the necessary mental state and carries out an action leading to the crime can be held legally responsible. Students, therefore, are rarely encouraged to view the criminal acts and the person who committed them holistically or from any other standpoint than one centered on liability.

In order to objectively study a case, students are encouraged to refrain from inward moral reflections on the higher values of the law or its tensions with morality and ethics. For example, students learn that a lawyer for a property owner may not want to seek the eviction of a single mother with young children but will need to do so in order to perform the duties falling under her lawyer-client relationship. Questions about why and how social structures facilitate social exclusion (and discrimination) of the tenant are usually not seen as relevant. Students will further learn that a defense lawyer may find her client's actions morally reprehensible but must nonetheless zealously advocate on his or her behalf because of the belief that all people deserve strong legal representation. The mental health of the accused, and lack of health care services, would only get addressed in the classroom to the extent that it would affect liability or punishment. When it comes to legal issues concerning serious crimes or perpetrators of mass violence, the reasoning and approach remain largely the same.

Because the emphasis is on formal legal characterizations, analysis of case law, and approaching fact patterns "neutrally," the legal classroom becomes an environment for delving into technical and sometimes minute legal issues and debates. This environment is important because understanding legal processes, legal decision-making, and legal developments is essential for a future in the legal profession. Yet, it may also do a disservice to young legal minds because they may become too detached or distanced from the individual accused of committing horrendous acts. They may also become too technically focused and therefore less creative in their thinking or lose sight of the bigger picture. Perhaps "thinking like a lawyer" should also mean something beyond good analytical skills and the ability to distance oneself emotionally.

"Thinking Like a Lawyer": Context Matters

Thankfully, more recently, law professors, myself included, have been expanding what it means to "think like a lawyer." According to Anne-Marie Slaughter, it requires the following:

> [T]hinking with care and precision, reading and speaking with attention to nuance and detail. It means paying attention to language, but also understanding that words can have myriad meanings and can often be manipulated. It thus also means *paying attention to context and contingency*. […]
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> Thinking like a lawyer means *combining realism with idealism*. It means believing in the possibility and the desirability of both order and justice, and in the capacity of the law to help us achieve them. But it also means *knowing the full range of human conduct*, and understanding that grand principles will remain paper principles unless they are implemented with an eye to human incentives.
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> *(Slaughter 2002) [emphasis added]*

Along this line of thinking, the aim of "thinking like a lawyer" requires the law to be understood within a broader context and "knowing the full range of human conduct." If this is the case, then equipping law students to view perpetrators from disciplines other than law would benefit the learning process. But how easy is it to introduce greater context into the legal classroom?

Law students in Africa, Asia, Central and South America, and Europe generally start their Bachelor of Law (LLB) directly after their secondary education and then potentially follow up with a Master of Law (LLM) [or equivalent]. These students therefore have had little or no exposure to university-level coursework in fields other than law, and the same may be the case for their professors. The growing number of liberal arts colleges around the world whose students then do additional degrees in law are therefore a welcome development. For US legal classrooms, students will already be bringing in a wide array of disciplinary backgrounds since students must first complete a minimum of a Bachelor's degree in a field other than law before they can commence their graduate-level legal education for a Juris Doctorate (JD). American legal classrooms regularly have students with degrees in political science, social science, history, economics, engineering, mathematics, literature, international relations, philosophy, business, and psychology, amongst others. This diversity of background lends itself well to introducing more interdisciplinary concepts into class discussions. Moreover, since law professors in the US have educational backgrounds in disciplines other than law, they should, at least in theory, feel comfortable introducing linkages between disciplines in order to show how another field could potentially impact legal reasoning or legal developments.

Yet, even in the American legal classroom where arguably the students and professors have broader disciplinary backgrounds, with a few exceptions, progress has been slow. This reluctance on the part of legal educators to introduce more contextual background and interdisciplinarity may be due, in large part, to the fact that in many places legal classrooms are generally geared towards training students to enter the legal profession rather than focused on legal academics as such. It results in there being only limited space for broader academic debates, even if "thinking like a lawyer" requires more.

What the Field of Perpetrator Studies Can Offer

Despite the slow progress, undoubtedly, in the last few decades there has been a greater emphasis placed on interdisciplinarity in legal classrooms all over the world. In those legal

classrooms that do delve into political violence, serious criminality, or mass victimization and perpetration, Perpetrator Studies has a lot to offer precisely because of its interdisciplinary emphasis. In my experience, exposure to scholarly work and concepts from other disciplines is invaluable to legal students in order to better understand and appreciate the role of the perpetrator within his or her social environment or the legal and political backdrop of a criminal process. For instance, legal educators could introduce philosophical texts, such as those by Hannah Arendt on the trial of Adolf Eichmann and concepts of evil and pair them together with an analysis of her work and its influence on theories of international criminal law (Luban 2011). This would allow students to view their discipline from another perspective and be encouraged to question the very categorizations and labeling that they have been applying in their studies. It would allow them to grapple with tensions between morally wrong actions and legally wrong actions and assess how well the law responds to these differences. Another option would be to bring in anthropological texts focusing on the ethnographic study of cultures and/or political violence or the failure of courts to take cultural traditions into account. Books such as those written by Tim Kelsall on culture and cross-examination apply an anthro-political perspective to the trials at the Special Court for Sierra Leone (Kelsall 2009). He highlighted how the court failed to understand local culture to its detriment, negatively impacting its ability to properly charge crimes or to find a convincing means for assessing the credibility of witnesses. Likewise, research into "cultural defenses" from anthropology are now gaining attention because of the decision by the International Criminal Court to prosecute Dominic Ongwen, who was himself a former abducted child soldier, for war crimes and crimes against humanity (Eltringham 2013; Wilson 2016).

Additionally, looking at documents that prosecutors and defense attorneys at the international criminal courts and tribunals introduce into trial may be a good starting point to show how non-legal fields have tremendous importance within legal settings. At the Extraordinary Chambers in the Courts of Cambodia, for example, entire books on the history of the Khmer Rouge were entered into evidence. One such author, Professor of History, David Chandler, was called as an expert witness in the first trial to testify about the day-to-day operations of the prison where the accused worked. Other expert witnesses included Dr. Chhim Sotheara to testify on the psychological impact of the Khmer Rouge regime on the general population and Stéphane Hessel, a former French diplomat and Holocaust survivor, was called to testify on the issue of forgiveness and about his opinion of historical processes and events such as the Nuremberg Trials of Nazi war criminals. Students should learn early on how such an array of perspectives lends itself to better understanding the crimes and the perpetrators.

Beyond scholarship, Perpetrator Studies opens up other avenues of learning, including through film and other media. Film scenes can offer a visual portrayal of abstract theories and concepts taught in the legal classroom (Champoux 1999). They can be used as case study examples as well as an introduction to different cultures and histories, and they tend to work well for increasing student engagement with the written material. Introducing law students to socio-psychological studies through the documentary film *Obedience* (1969), which focuses on the famous Milgram experiments, or *Quiet Rage: The Stanford Prison Study* (1992), which documents the well-known attempt to investigate the psychological effects of perceived power, may enhance law students' understanding of the complexities behind mass perpetration. Non-documentary films may also be useful. Films such as *Im Labyrinth des Schweigens* (Ricciarelli et al. 2016) [Labyrinth of Lies] can show some of the contextual and moral issues at play when domestic systems seek to pursue the accountability of perpetrators of mass violence years after the crimes have taken place. Film footage is also a useful tool for showing the variety of approaches (or lack thereof)

to how trials around the world have taken place and how they have developed over time. Issues of agency and inclusion are very important for the students to understand and critique. For example, contrasting images from the Nuremberg trials where few women played prominent roles with modern proceedings before the International Criminal Court would allow the students to discuss and debate what changes, if any, have taken place over the last 70 years.

One of the main difficulties when teaching about perpetrators in law school is creating a space for more interdisciplinary readings, methods of teaching, and discussions in the classroom. This is certainly something that I have grappled with. As in most fields, within law, there is a limited timeframe in which to convey a great deal of information and material to the students. Moreover, depending on the institutional setting, teachers may face challenges when trying to introduce the above-mentioned non-legal material, due to administrative constraints. Yet, the benefits of drawing on a broader array of sources and methods are clear. As a first step, I suggest that legal educators experiment with new approaches to teaching that go beyond primary legal sources and legal scholarship. They can show how law operates through lived experiences, where it succeeds, and where it fails. By doing so, law students will learn to "think like a lawyer" in its broader sense, embracing a variety of human experiences and contexts. They will likely become more rigorous in their analytical reasoning and more creative in their argumentation. For both students of law and legal scholars, Perpetrator Studies, which is inherently interdisciplinary, opens up great possibilities for better understanding the roles, values, and limitations of law in societies around the world.

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