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Elizabeth Mertz

The Language of Law School:

Learning to 'Think Like a Lawyer'

In recent years American legal education has come under scrutiny. Educators and administrators have questioned whether current law school curricula and pedagogical methods best prepare students for the practice of law in a rapidly changing, diverse, and increasingly interconnected world. Law schools are searching for sound empirical research to guide them through a process of reform. The two leading sources for this information have been the American Bar Foundation and the Carnegie Foundation, whose recently-released reports on legal education have been garnering national attention. Indeed, the Carnegie Foundation for the Advancement of Teaching's highly-regarded report, "Educating Lawyers: Preparation for the Profession of Law" (2007), itself drew heavily on the work of **Senior Research Fellow Elizabeth Mertz**, who for many years has studied law school education from a linguistic perspective.

Mertz's large-scale research project analyzes data compiled through meticulous fieldwork. She finds that law school classrooms, though they differ in geographic location, student composition, faculty philosophies and other factors, share a common linguistic structure. Mertz argues that, by way of the linguistic dynamics of law school classrooms, law students are gradually indoctrinated into a distinctive legal world-view, which, while it provides them with powerful analytic tools, also closes them off from alternative social

perspectives, to the detriment of both the profession and the public. Her most recent findings were published this year in *The Language of Law School: Learning to 'Think Like a Lawyer'* (Oxford), and "Inside the Law School Classroom: Toward a New Legal Realist Pedagogy," *Vanderbilt Law Review* Vol. 60, no. 2.

With graduate degrees in both law and anthropology, and herself a law professor, Mertz is well-positioned to conduct an in-depth empirical study of American legal education. Hers is the first study to examine law school teaching in terms of language at a very fine level of detail, employing the methods of linguistic anthropology and sociolinguistics. In the initial section of her study Mertz observes and records the teaching of law to see "whether law school pedagogy has a shared linguistic structure and/or epistemological message across otherwise quite diverse classrooms." Such commonalities across classrooms are important because "subtle cultural messages can be encoded in discourse structure, so that any shared features of law school classroom language are potential keys to a commonly-held, distinctive legal worldview." In the second section of the study Mertz shifts her focus from the worldview underlying legal school language to the larger structure of classroom discussion. Here Mertz considers the frequency and duration of student classroom speech, in relation to the gender and race of both students and professors. She then analyzes how all of these factors interact "to

create more or less inclusive classrooms for students.”

Linguistic anthropology and sociolinguistics “insist on detailed observation of... exchanges and on the use of verbatim linguistic data.” Thus, for her research, Mertz carefully selected eight law schools from across the nation, representing the status hierarchy of schools,

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with “three from the ‘elite/prestige’ category, two from the ‘regional’ category, and three from the ‘local’ category.” First semester Contracts classes at each school were tape-recorded in their entirety, while at the same time, researchers sat in the classrooms and coded aspects of classroom interactions, focusing on “each class turn (such as the length of turn, gender/race of speakers, and whether the turn was volunteered or called-on).” The resulting tapes, transcripts and coding sheets were used to create fine-grained summaries of each class session, which were augmented, when subjects were willing, with interviews of professors and of small groups of students. Mertz’s detailed empirical study thus “combined qualitative and quantitative analyses to produce a more accurate under-

standing of law school classroom dynamics.”

Shared Message: Learning to Speak, Read, and Think Like a Lawyer

Since Mertz’s main focus was on the linguistic dynamics of the classrooms, she limited her study to first-year Contracts classes, so that the content of the teaching was as constant as possible. At the same time, first year, first-semester classes were chosen because it is in these classes that incoming students are exposed to “their first re-orientation to language as they enter their new chosen profession.” Mertz likens this experience to an initiation rite and compares it to the reorientation to the human body that new medical students experience as they dissect their first cadavers in gross anatomy lab. As first year medical students develop a dispassionate “clinical attitude,” so first year law students learn to “think like a lawyer,” according to Mertz. Mertz’s research points to the crucial role of language in the reorientation of new law students. “What we found in the law school classrooms was that linguistic norms are ruptured as law students are urged to give up old approaches to language and conflict and adopt new ones. ‘Thinking like a lawyer turns out to depend in important ways on speaking (and reading, and writing) like a lawyer.’”

The Importance of Being Pragmatic

The contextual structuring of language in human interactions is termed “language pragmatics” by anthropologists and linguists who study the “interface of language and society.” Rather than analyzing words in terms of their decontextual qualities, as in standard “semantic”-based approaches, Mertz observes the “pragmatic” or contextually dependent aspects of classroom language. As Mertz states, in various social contexts, including the law school classroom, “subtle

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aspects of language work to reinforce or even create an underlying orientation to the world.” Professors impose patterns of linguistic interaction in classrooms, which in turn convey indirect messages to students about the law and its workings in society.

One way to study linguistic patterns in classrooms is to examine “uptake structure.” “Uptake” measures whether a student’s answer to a previous is incorporated by the professor in a subsequent question. As Mertz states, “if the teacher takes up some part of the student’s response in a subsequent question, then the student has had an impact on the classroom exchange.” Mertz notes that the Socratic method of teaching, frequently used in law school classrooms, “is characterized by low amounts of uptake.” By incorporating relatively little of first year law students’ responses to questions, professors steer students towards aspects of legal texts they

would not be accustomed to seeing and away, at least initially, from the “social contexts and moral overtones” inherent in human conflicts.

Many of Mertz’s classroom transcripts illustrate the paucity of uptake in Socratic dialogue between professors and students. In this somewhat humorous example, a student is questioned about a case in which a professional entertainer sued a plastic surgeon for malpractice, claiming he had disfigured her, after which the surgeon appealed the court’s decision (the symbol // // indicates overlapping speech, and () indicates inaudible speech) :

Prof.: What errors were alleged in the appeal of *Sullivan v. O’Connor* () Ms. [A.]? What errors were alleged in the appeal of *Sullivan v. O’Connor*?

Ms. A.: Um the defense claimed that um the judge failed in allowing the jury to take into account for damages anything but a claim for out-of-pocket expenses.

Prof.: Well that’s a rather general statement. How did this get to the appellate court?

Ms. A.: Well the um the patient was a woman who wanted // a//

Prof.: //How //did this case get to the appellate court?

Ms. A.: The defendant disagreed with the way the damages were awarded in the trial court.

Prof.: How did this case get to the appellate court? The Supreme Court once ah-I think this is true—they asked some guy who’d never argued a case before the Supreme Court before, they said to him—he was a Southerner—and they said to him ah “Counsel, how did you get here?” [[laughter]] “Well,” he said, “I came on the Chesapeake and Ohio River.” ((*imitated Southern accent*)) [[louder laughter]] How did this case get to the supreme judicial court?

Ms. A.: It was appealed.

Prof.: It was appealed, you say. Did you find that word anywhere except in (the) problem? [+positive uptake]”

“Slowly but surely,” Mertz states, “law students learn to listen for new aspects of the ‘conflict stories’ with which they are presented,” and they learn how to do this, “through the restructuring, in context, of the very language in which they discuss what they have read.” Mertz’s transcripts show that even professors who use a modified Socratic structure or who use lectures as their primary mode of teaching still rely heavily on a question and answer format (in the case of lectures the professor poses and then answers his or her own question), and this format is used to “refocus students’ attention on layers of textual and legal authority.” Through the professor’s repeated questioning, students are directed to consider the status of the authoring court in the hierarchy of courts, the procedural stance of the case, the doctrinal categories or statutory provisions the court discusses, and other similar issues.

Legal Language and Legal Epistemology

Through her careful analysis of the structure of law school classroom discourse, Mertz finds that a distinctive legal worldview is conveyed to students in the course of their studies. For example, when new law students begin to discuss cases and the conflicts they contain, the students usually start by focusing on the content of the story. Professors, on the other hand, want the students to organize the “facts of the case” around legal arguments and precedents. As an illustration of this phenomenon, Mertz provides a transcript where a professor interrupts a student who is trying to elucidate the case by “telling the story” in a “layperson’s narrative frame,” where it is quite common to start by introducing and describing the main characters (the symbol (.) indicates a short pause, () indicates inaudible speech

and // // indicates overlapping speech):

Prof.: Hi. Um, can you start developing for us the arguments for the plaintiff and the defendant. (.) Um, Ms. N.?

Ms. N.: Um, that the plaintiff was a young, youthful man// with//

Prof.: //great// the plaintiff was a beautiful man (.) [[class laughter]] Is that what you said?”

(After interrupting the student,

“Linguistic norms are ruptured as law students are urged to give up old approaches to language and conflict and adopt new ones. ‘Thinking like a lawyer turns out to depend in important ways on speaking (and reading, and writing) like a lawyer.’ Christian in nature

the professor directs her to skip narrative details and move to the legal issues):

Prof.: “Okay, all right, so there’s a lot at stake in the choice of which branch of this rule to apply in this particular fact situation. And all I’m interested in, Ms. N., is what the arguments are, um, for cost of completion, which is what the plaintiff wants in both cases, and what the arguments are for diminution in value, which is what the

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defendant wants in both cases, all right? All I want is the argument, okay?”

Through their repeated questioning of students, through interruption, and by incorporating relatively little of students’ answers in subsequent questions, professors reframe the telling of the conflicts found in cases in terms of legal and textual authority, guiding the students to consider what the court was authorized to decide. If the court “writes about hypothetical situations other than the one before it, students learn, this part of the story is to be separated from the ‘holding—the authoritative part of the case. The holding is valid only if uttered by the correct authority, following the correct procedure, delivered in the correct form.” As Mertz points out, “this is a new and very different sense of where to look when we decide what counts as a ‘fact,’ how to construct valid accounts of events, and where to demand accuracy.”

In the course of their first semester class students are called upon to be more and more precise “about the texts, their institutional histories, and their relationships with other texts (precedent, for example).” Mertz’s classroom

transcripts document that this happens in all the classrooms studied, regardless of the status of the law school or the philosophy of the professors. Yet, Mertz points out, at the same time this is happening, professors sometimes allow broad discussions of the social contexts in which disputes evolved, permitting a wide range of suppositions and loosely-supported hypotheses, “with very little consideration of how to achieve greater accuracy,” as, by contrast, a social scientist would likely demand. “The move to focus on form, authority, and legal-linguistic contexts is thus accompanied by a shift away from precision and depth in discussions of content, morality, and social context,” Mertz reports.

This lack of precision when discussing the social context of cases is paralleled in the way professors and students talk about and for the parties in the cases they are analyzing. Mertz notes that in classroom discussions professors and, following their lead, students frequently use “fictionalized reported speech” as the following transcript illustrates:

Prof: [...] But of course it does put Ever-Tite Roofing in an excellent situation. They draft the terms of the offer and they decide whether to accept it or not, you know. They’re like, ‘You want a deal? Sure. Maybe not.’ They – they’re playing both sides. Now, um, how long after the offer is given from the Greens to Ever-Tite Roofing, uh, do we get the commencement of performance in the case? I think it’s nine days, right?

Mr. M.: Right.

Prof: Then nine days later, Ever-Tite Roofing packs up the truck and heads for the Greens. But what happens when they get there?

Ms. L.: Someone else is there ().

Prof.: Someone else is already on the job. Okay? The Greens’ argu-

ments are really two, it seems to me. One: ‘Our offer expired. It lapsed. There’s nothing out there to accept anymore. You waited too long.’ The court doesn’t buy that one. Uh, two: ‘The offer’s still valid but you haven’t accepted yet.’ That second argument, Ms. L., was really an argument about what that phrase means in the offer, ‘commencement of performance,’ isn’t it? According to the Greens, what would commencement of performance have been?

Ms. L.: Um, well, after showing up at the house, saying ‘Okay, you can start’ –

Mertz notes that in this excerpt the professor and students appear to be merely reporting or animating words authored by the parties in the case, while at the same time they are actually “putting words into these characters’ mouths,” and

“Men spoke more frequently and for disproportionately more time than did women in six of the eight classes.”

thus function as “authors as well as animators” of the reported speech. The authoring of speech by professors and students is significant, Mertz reports, because it conveys several subtle ideological messages.

First, by using reported speech in their classroom exchanges, professors convey to students “a quiet message about the power of legal discourse to... create reality.” Once again, this discourse always gives primacy to “the layers of legal and textual authority...in determining the ‘truth’ of events.” The words that professors and, gradually, students use to report the speech of people involved in

conflicts emphasize “legally relevant argument and strategy,” as if “strategic considerations were already part of the characters’ internal or external dialogue throughout the entire story.” Through this process, the intricacies of the social context in which conflicts play out are pushed to the margins, as professors focus on the strategic positions of the parties.

Secondly, while professors appear to be reporting the speech of parties in conflicts, they are actually ‘authoring’ a narrative through the voices of others. Mertz finds similarities in professors’ use of reported speech and that of attorneys as they question witnesses in court. As Mertz states, “in court, attorneys create an authoritative version of the ‘facts’ by developing competing stories via the utterances of witnesses. Attorneys attempt to shape these utterances, selecting particular witnesses and coaching them to present the story that is most favorable to their side. The witnesses often give the appearance of being both authors and animators of the stories they tell, but the attorneys in fact share the author role, not only through coaching witnesses, but also because they actually co-produce the narrative as they elicit testimony from witnesses through questioning.” The use of reported speech both in the courtroom and in the classroom is problematic, according to Mertz, in that it “foregrounds an inauthentic authorship and hides the complex play of social power and discursive maneuvering that really controls the utterance.”

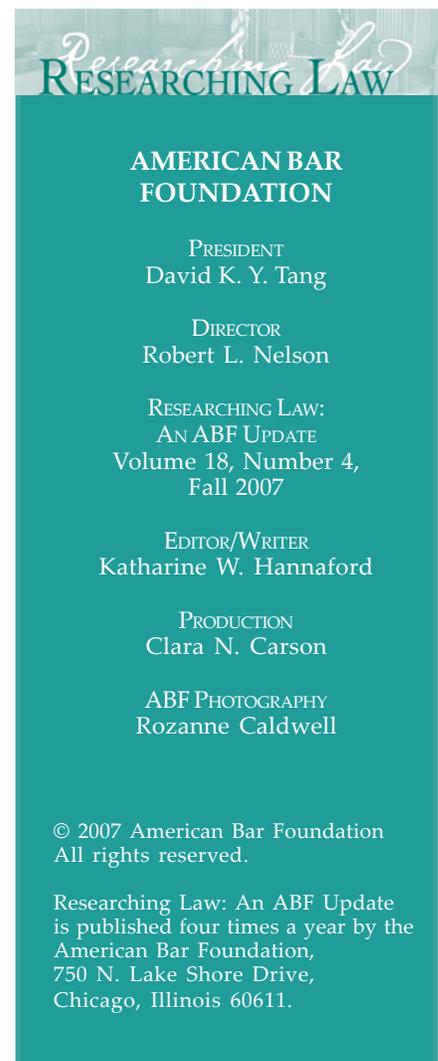
The final ideological message conveyed through the use of reported speech is the “primacy of the dialogic form in legal discourse.” Professors convey this message through the use of reported speech, but also by posing and answering their own questions (as well as by engaging students in Socratic dialogue). By revealing

In the Mertz study, black students spoke more freely and contributed more substantially in the classrooms in which they had both cohorts and professors of color available to them for support.

their own internal question-and-answer dialogue, professors demonstrate the process of legal reasoning. Professors show students that they “must gain a new capacity, responding to and initiating argumentative dialogue with others and using internal dialogue structured around the posing of a series of questions to analyze legal texts.” Continually emphasizing argumentative and analytic dialogue throughout students’ first semester, professors convey the message that the “adversarial process is the means by which legal truths and facts are ascertained, and it is the means by which law obtains legitimacy in the wider society...”

As Mertz points out, the strength of the adversarial process is that it ensures that both sides in a conflict are represented and that by “running the facts through the filter of legally relevant categories” attorneys may at times help individuals escape “the prejudices and inequities of socially embedded moral judgments.” At the same time, however, Mertz argues that the way legal reasoning is taught and practiced “creates a closed linguistic system that is capable of devouring all manner of social

detail, but without budging from its core assumptions.” Because attorneys advocate for their clients in an adversarial setting, they are “required to hold onto [their] client’s interests and to contest any data that might get in the way.” Mertz contrasts this way of thinking and acting to that of academics in, for example, the social sciences, who are forced, at least eventually, to revise their theories when confronted with conflicting or contradictory data. Because lawyers are trained to seek truth through argumentative dialogue it is difficult to introduce “humility



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“If students of color and female students tend to be more silent in law school classrooms, then any differences these students bring with them in terms of experience or background are not given voice in the crucial initial socialization process. To the extent that these differences in experience reflect race, gender, class, or other aspects of social identity, we again see aspects of social structure and difference pushed to the margins of legal discourse.”

into legal thinking”. Yet, Mertz argues, “a more subtle and sophisticated understanding of the social world could arguably contribute to better legal outcomes,” if lawyers were more receptive to findings from empirical social science research.

Different Classroom Patterns: Whose Voices are Heard?

After thoroughly analyzing the details of language in context in

first year law classrooms, in the second section of her study, Mertz expands her focus to examine “the structure or form of the classroom discussion itself.” Her findings in this section concern race and gender in both students and faculty and how these factors influence classroom participation. While her analysis of language revealed striking similarities across diverse classrooms, Mertz’s analysis of the patterns of classroom interactions uncovers both similarities and differences among classrooms. In general, though, Mertz’s codings of the give and take between professors and students provide data that show less frequent participation of both female and minority students, a finding that “seems to be consistent across most of the research done to date in law schools.”

When the gender dynamics of classroom interactions were examined, Mertz found that “men spoke more frequently and for disproportionately more time than did women in six of the eight classes.” These six classes were taught by men, except for one class taught by a woman at an elite/prestige law school. The two classes where women students’ speech was proportionate to their numbers in the class (or even slightly higher) were taught by women at “local” law schools.

As Mertz states, the “overwhelming majority” of other studies of legal education have “found skewing toward male students in class participation rates.” While observational studies like Mertz’s are relatively few (and mostly conducted by students themselves) recent student-led studies at Yale, Harvard, and the University of Chicago have “still found differential participation by male and female students,” Mertz reports. These findings dovetail with self-reports of female students who have “repeatedly reported lower rates of participation and

self-confidence, along with higher levels of distress.”

When race was examined, Mertz and her research team “found some dramatic relative disproportions in favor of white students, ranging as high as 289%.” However, some variations from this pattern were also seen. In the two classes that were taught by professors of color, students of color took turns speaking proportionate to their numbers in class. In a class taught by a white male professor, using a modified Socratic teaching style at a “regional” law school, “students of color participated at rates greater than would be expected, given their relative proportion in the class.”

Nevertheless, in general, Mertz’s study as well as previous studies point to lower participation by students of color. “Self report studies have generally painted a picture of lower in-class participation by students of color than by white students,” Mertz reports, “coupled with more negative reactions to law school...” Conversely, a number of other studies “indicate that African-American students who attended historically black law schools have had a different experience,” Mertz reports. Mertz cites these studies, as well as her own observational study to support “the hypothesis that black students talk more freely and contribute more substantially when they have both cohorts and professors of color available to them for support.”

Some interesting variations to the patterns concerning gender and race in class participation raise questions for further research. For example, though Mertz reports that female students participated in proportion to their representation in the two classes taught by female professors in non-elite schools, “along with other researchers, we did not find that the encouraging effect of female law professors was

as great in more elite schools, leaving us with a question about the interaction of school status with gender.”

Students of color, on the other hand, spoke more in classes taught by professors of color, regardless of the status of the school. As noted above, students of color spoke most in those classes taught by professors of color, where substantial numbers of their fellow students were also of color.

Mertz finds parallels between the patterns of classroom interaction and the closed linguistic structure of law school instruction, where the emphasis on legal and textual authority relegates the details of social context and social difference to the margins. The relative silence of students of color and women in law school classrooms raises questions about “cultural invisibility and dominance.” Mertz raises the concern that “if students of color and female students tend to be more silent in law school classrooms, then any differences these students bring with them in terms of experience or background are not given voice in the crucial initial socialization process. To the extent that these differences in experience reflect race, gender, class, or other aspects of social identity, we again see aspects of social structure and difference pushed to the margins of legal discourse.”

Toward a New Legal Pedagogy

Despite their limitations, Mertz does not advocate discarding teaching methods, including the Socratic method, that perpetuate law’s closed linguistic system. Students continue to need to learn this legal “lingua franca” in order to function as attorneys. And law’s linguistic system contains positive aspects. Mertz notes that “there is without question a certain genius to a linguistic-legal framework that treats all individuals the same, in

“Unlike scholars in some other fields, law professors have not been trained to ask themselves systematically what their method cannot do, or where the limits of their approach lie.”

safely abstract layers of legal categories and authorities, regardless of social identity or context.”

However, while this move toward abstraction can counter those aspects of social context that lead to bias, at the same time “this process conceals the ways legal results are often quite reflective of existing power dynamics, while simultaneously pulling lawyers away from grounded moral judgment and fully contextualized considerations of human conflict.” Thus, “the legal system itself, while purporting to serve all citizens equally, can hide behind the screen provided by its legal-linguistic filter, concealing even from itself, the way that inequalities are integral to its structure.”

The increasing diversity of American society, as well as the spread of the “rule of law” in an increasingly interconnected world promise to bring into even greater relief the conflicts inherent in the “double edge” of the linguistic structure of American law. How, then, to best prepare lawyers for their future roles in a “democratic state and diverse world”? Based on her research findings Mertz offers some recommendations for im-

proving law school pedagogy.

First, she argues that law professors themselves need to become more aware of the limitations built in to the structure of legal discourse, that they embrace an “epistemological modesty,” by becoming more open to other perspectives and frameworks of knowledge. This would require a creative and voluntary reorientation toward their field since, “unlike scholars in some other fields, law professors have not been trained to ask themselves systematically what their method cannot do, or where the limits of their approach lie,” Mertz notes. Secondly, students would benefit if professors integrated this openness into their classrooms, by calling attention to the limitations as well as the strengths of law’s linguistic system as they teach. Finally, law school professors and administrators should pay close attention to classroom “culture and context.” While more research is needed, Mertz’s study suggests that it may be important to consider the effects of minority professors and minority student cohorts on how students of color fare in law school. Students of color can also add alternative voices to classroom discourse.

Elizabeth Mertz is a Senior Research Fellow at the American Bar Foundation and Professor of Law at the University of Wisconsin Law School. In addition to support from the ABF, Mertz’s research on law school education was funded by the Spencer Foundation. Mertz reports on her research in *The Language of Law School: Learning to “Think Like a Lawyer”* (Oxford, 2007) and in “Inside the Law School Classroom: Toward a New Legal Realist Pedagogy,” *Vanderbilt Law Review*, Vol. 60, No. 2, 2007

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