Language in Society **37**, 737–760. Printed in the United States of America

REVIEWS

Language in Society **37** (2008). Printed in the United States of America
doi:10.1017/S0047404508081013

ELIZABETH MERTZ, *The language of law school: Learning to think like a lawyer*. Oxford: Oxford University Press, 2007. Pp. xiii, 308. Pb $35.

Reviewed by PETER TIERSMA
Loyola Law School, Los Angeles
919 Albany Street
Los Angeles, CA 90015, USA
Peter.Tiersma@lls.edu

Most anthropological research is conducted on people who will never find out what is written about them. An anthropologist's worst nightmare is probably to have a study read and critically examined by its subjects. In the book under review, Elizabeth Mertz reports on an extensive study of teaching methodologies and classroom interaction in law school courses on contract law. Although originally trained as a linguist, I am currently a law professor who for about 15 years has used a teaching style very similar to that described and dissected by Mertz, to teach both contract law and the related field of remedies. This has the advantage that I know a great deal about the subject. At the same time, I may be somewhat defensive of the way in which I and the great majority of my colleagues teach law school courses.

Of course, Mertz has her own potential biases. Although primarily a linguistic anthropologist, she has a law degree and has observed the law school classroom experience at first hand as a student. Although they typically get used to it over time, many law students take a strong dislike to, or may even be traumatized by, the interactive nature of law school teaching. It's a drastic departure from their undergraduate days, when they could passively attend lectures, defer reading the materials until the end of the quarter or semester, cram during dead week, and still get a passing grade.

The research reported by Mertz was aimed at discovering how the system of legal education teaches students to think and talk like lawyers, and to explore some of the implications. Mertz and her associates made audio recordings of eight contracts courses in various law schools. Those recordings were later transcribed, coded, and analyzed. The analysis of the transcripts was then supplemented by interviews with the professors and students in the classes.

Although it's not a fatal flaw, the professors and classes were not chosen randomly. Obviously, surreptitious recording would have presented legal and ethical problems, so only faculty members who agreed to participate were included in the study. It is therefore possible that this self-selection influenced the results. For example, based on the portions of the transcripts in the book, my impression

© 2008 Cambridge University Press 0047-4045/08 $15.00

https://doi.org/10.1017/S0047404508081013 Published online by Cambridge University Press

is that the professors in the study were generally quite good teachers. In addition, the group of professors was selected to include several women and members of racial and ethnic minorities; like much sociolegal research, this study was particularly interested in race, class, and gender. The ratio of male to female teachers in the study did not diverge too much from national averages, but the number of minority professors was about twice as high as it is overall in American law school faculties. In terms of race and gender, the students were similar to the national statistics on first-year law students in 1990–1991.

Most of the study focuses on teaching styles and classroom interaction. Preliminarily, it should be noted that much law school teaching revolves around the discussion of reports of judicial decisions, also called case reports. Moreover, most classes are taught by means of what in the legal academy is styled the "Socratic method." In its purest form this method involves eliciting all information – the facts of a case, the outcome, the legal rule necessary to reach that outcome – from the students themselves by means of very focused questioning. Traditionally, the professor picks a student at random, who is required to stand and answer questions about the case, sometimes for an extended period.

Although seven of the eight professors in this study used some form of the Socratic method, none did so in the traditional and intimidating fashion that is sometimes caricatured in film. Three engaged (as I also do) in a "modified" Socratic method, involving a great deal of interaction with specific students, mostly by asking them questions, but in various ways mitigating the stress that being called upon in class can cause, as well as sometimes lecturing to clarify a point. Another group of four professors, including all three women in the study, used what Mertz calls a "short-exchange" approach, which differs from the modified Socratic method by using shorter exchanges (one or two turns) with a larger number of students, and somewhat more lecturing. Only one professor used mostly lecturing.

A particularly striking finding about these differing teaching methods is that they all aim to produce the same result. As Mertz puts it, "identical lessons [are] taught through varying pedagogical means" (p. 93). Regardless of teaching method, or whether the classes were in more or less prestigious law schools, the great majority of class time was devoted to teaching how to read cases and to uncovering basic doctrinal principles (169). Although the white male professors in the study favored a modified Socratic method and female professors the short-exchange approach, teaching methodology does not seem to make a significant difference in teaching students to "think like lawyers."

Although all the studied teaching methods aimed to teach students the basic principles of the law and the skills needed to be lawyers, Mertz suggests that they might differ in more subtle ways. Several scholars have argued that the law school experience can have a discouraging or chilling effect on women or stu-

https://doi.org/10.1017/S0047404508081013 Published online by Cambridge University Press

dents of color. Mertz's data suggest that minority students participate (i.e., speak) more in courses taught by professors of color, especially when the class contains a relatively high percentage of minority students. Yet students of color also had a higher participation rate in two classes taught by white instructors, including one who used a relatively Socratic teaching style. In terms of gender, male students in six of the classes participated more in terms of both time and number of turns. The two classes in which females predominated were both taught by women.

Mertz's study thus suggests that faculty diversity can promote classroom speech by students of color and women. Of course, it is not clear that higher verbal participation leads to greater knowledge of the subject matter. Yet it is undoubtedly true that a diversity of viewpoints enriches the learning experience of all students.

In addition to examining classroom interaction per se, Mertz discusses how students are taught to read legal texts, especially the case reports that populate the textbooks used to teach in American law schools. In most courses, much of the discussion centers on the principle or rule of law that was used to decide a case in question. Sometimes the rule is expressly stated; on other occasions, it must be derived from the facts and outcome of the case via legal reasoning. Students, according to Mertz, are taught to approach these case reports not as stories, but in terms of "layered legal authority." As a consequence, "the content of the texts – stories of human conflict and pain, of moral dilemmas and social injustice – is subtly subjugated to the structures and strictures of law" (58). Essentially, this process is implemented discursively by the professor's giving positive feedback when students mention legally relevant facts and by reacting negatively (or, more commonly, pressing students with additional questions) when students mention facts that the professor deems legally superfluous. Thus, according to Mertz, many of the insights that people of different social or ethnic backgrounds might have are rendered "invisible" (73). Nonetheless, she admits that "after a text has been properly read, there is quite broad latitude for consideration of possible social or moral implications" (76).

Mertz's discussion about how students are taught to read cases is, in broad outline, directly on the mark. In fact, this is exactly how I and most of my colleagues teach the core subject areas of the law. If you want to learn how to "think like a lawyer," you have to learn to identify which facts are relevant to a legal decision and which are not. Judges and scholars may debate whether certain facts should matter, but there is almost universal agreement that many social facts, such as whether a contract was made on a Tuesday on the third floor of the Acme Building, or, conversely, on Wednesday on the second floor, are virtually always immaterial. It is also the case that most law professors rigorously distinguish what many call "doctrine" from "policy." In other words, we normally first try to ensure that our students understand the relevant doctrine (the current

https://doi.org/10.1017/S0047404508081013 Published online by Cambridge University Press

state of the law), and then often move on to discuss policy (whether a different rule – perhaps one that considers social factors that are presently deemed irrelevant – would provide a more just or fair approach).

What about race, ethnicity, or gender, which occupy so much of the professional attention of sociolegal scholars? It is true that law professors may sometimes "silence" students who raise such issues. There is no doubt that such factors can be quite relevant, of course, but the degree of relevance depends on the legal issue in question. Factors like race, economic status, and gender do not play a major role in most of contract law (although there are some notable exceptions, such as the doctrine of unconscionability), but they almost invariably get a great deal of attention in areas such as employment discrimination law and certain areas of constitutional law, to mention two examples.

Mertz's study seems to presume that factors such as race and gender should ALWAYS be considered, or in any event that they should be discussed much more in law school than they presently are. Yet after recording and analyzing hundreds of hours of classroom discourse, she provides few if any convincing examples in which a student raised the issue of race, class, or gender in a case where it arguably might be relevant, only to be silenced by the professor. I do not doubt that it sometimes happens, but based on the data presented here, silencing of this kind does not seem to be endemic to legal education.

It would be more accurate to say that the law CHANNELS consideration of moral and social issues into areas where it deems such factors relevant. Thus, if I had a student in contracts class who raised the issue of the pain and suffering that a negligent doctor caused to the plaintiff, I would suggest (in as nice a way as possible) that pain and suffering has nothing to do with the question of whether there was a contract, but that it might be relevant to the issue of damages, and that it would also be relevant if the patient had brought a tort action for negligence. It just doesn't make sense to waste valuable class time on an irrelevant issue.

Those who wish to learn about discourse in the law school classroom will learn a great deal from this book. And it lends support to the movement to diversify law school faculty. Yet some of its central hypotheses remain unproven, in my opinion. As mentioned above, the suggestion that legal education systematically silences or marginalizes social and moral concerns that ought to be taken into account is debatable. And the claim that this silencing, and the discursive practices of law professors in general, are particularly damaging to the educational prospects and performance of women and minority students may have some truth to it, but even if true, it is only a small piece in the puzzle of why various racial and ethnic groups graduate from law school and pass the bar at differential rates.

(Received 24 May 2007)

https://doi.org/10.1017/S0047404508081013 Published online by Cambridge University Press