

Book Review

THE LANGUAGE OF LAW SCHOOL*

by Elizabeth Mertz

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*Words are powerful, and what we do with them makes
their power evident.^[1]*

1 Since one thinks in words most of the time, his or her facility with language affects the nature and depth of his or her thinking. So when law students are told, as they almost invariably are, that they will be taught to “think like a lawyer”, they are led thus to believe that lawyers have a different way of thinking, that there are mystical paths to intellectual brilliance that are closed to outsiders.

2 If language is crucial to thinking, then it is important to know whether there is a commonality of legal language in the law schools. This question prompts Mertz, first, to examine common features that pervade the teaching of law in the US. She makes it clear from the start that “thinking like a lawyer” is not associated with any form of superior analytic skill. To her, “one thinks like a lawyer because one speaks, writes, and reads like a lawyer”. In this book, she examines how these skills are manipulated in the teaching of law. The widespread acceptance of the idea of “thinking like a lawyer” therefore compels her to begin by examining what the basic activities are, and then to see whether the law schools across the US share a common vision and approach. This she does in the first part of her book.

3 Mertz is acutely aware that any form of common vision or reasoning must deal with the fact that the professors (the teachers) as well as the law students all come from diverse backgrounds. That affects the way a person understands the law. Weaving his way through myriad legal concepts is the famous and ubiquitous “reasonable man”. However, from the anthropological point of view, and Mertz is an anthropologist, nothing can be more unreasonable than to expect people from diverse backgrounds to perceive the reasonable man in a common light.

* Oxford University Press, 2007.

1 *The Future of Scholarly Writing* (Angelica Bammer & Ruth-Ellen Boetcher Joeres eds) (Palgrave Macmillan, 2015).

4 Over time, law schools and lawyers begin to utilise language in order to establish consensus and commonality. Mertz takes the reader into the classroom to present her study and views as to the role of language in law, legal reasoning and education. Relying on transcripts of lectures she concludes that common strands of learning the law are discernible and “transcends variation in professors’ pedagogic styles and political philosophies”. Law is taught by the study of cases, and Mertz points out that the process of reading cases involves two “frameworks” – the framework of cases as precedent; and the framework of the procedural history of the case. In the first instance, decided cases are “speech acts”: not only do they report the decisions of the courts, but the “text themselves actually *are* the decisions: the words of the texts constitute or ‘perform’ the decisions” [emphasis in original].² Precedents come into being when the judges “build analogies between the case before them and earlier cases”.³ In the case of the second framework, the procedural history of the case is important because by the time a case reaches the appellate court, the case would have been shaped not just by its evidence (or facts) but also its procedural history since, generally, matters not raised before would not be addressed on appeal.

5 Both frameworks produce the basis for the development of past cases as precedent. Reading cases as precedent within those frameworks always involves an interpretative reconstitution of the past cases – “what a case means emerges only as it is interpreted as precedent in subsequent cases”.⁴ From here, Mertz examines how the facts (found by the judges in the cases) are retold in a classroom setting. She finds “striking commonalities” in the retelling of cases in the classroom. The classic components common to them are: first, the act of clarifying facts; secondly, applying law to the facts; thirdly, clarifying law; fourthly, parsing the effects of procedure; and fifthly, considering the social and political implications of the decision.

6 When a text is thus considered, one must bear in mind that it is not cold text admitting of a clearly discernible conclusion. As Roland Barthes pointed out, there are at least two meanings to a text – that of the writer, and that of the reader.⁵ But once this is recognised, the fact that professors come from different backgrounds – as do their students – cannot be ignored. Given the diversity of race, religion and

2 Elizabeth Mertz, *The Language of Law School* (Oxford University Press, 2007) at p 60

3 Elizabeth Mertz, *The Language of Law School* (Oxford University Press, 2007) at p 61.

4 Elizabeth Mertz, *The Language of Law School* (Oxford University Press, 2007) at p 63.

5 Roland Barthes, “Death of the Author” in Roland Barthes, *Image, Music, Text* (Hill & Wang, 1978).

wealth in America, how does one transform himself into the legal person who “thinks like a lawyer”? Law teachers characterise people who become “characters” in the reported cases. They are cleansed and presented in a form that loses some of their characteristics. Those may be characteristics which the people concerned might have otherwise thought personal, relevant and important. Whether the subject is the intention behind a crime or the “best interests” of a child:⁶

... what is important about people is dictated by legal doctrine, as deciphered through a genealogy of analogies. Each area of law will pose its own dilemmas for students, requiring them to separate some things that might otherwise be assumed to be linked in standard cultural accounts (someone’s prior behaviour, perhaps, from one’s assessment of how he acted in this particular instance).

The process in which an otherwise normal person from mainstream life enters law school and re-emerges from it transformed is quiet and unnoticeable. By the end of it, the student speaks “in an ‘I’ that is not their own self”.⁷

7 Scott Turow, reminiscing his freshman year at the Harvard Law School, writes in his memoir of that year that:⁸

... in reading cases I soon discovered that judges and lawyers did not like to sound like ordinary people. Few said ‘I’. Most did not write in simple declarative sentences. They wanted their opinions to seem like the work of the law, rather than of any individual.

The idea that lawyers think differently from ordinary people is a vainglory that lawyers often convince themselves to regard as true glory by speaking unashamedly in “jargonitis”. “Jargonitis” is not the mere “inarticulate utterance of birds” but is described pointedly by Sword as “unintelligible or meaningless talk or writing”.⁹ When one loses his way in order to think himself special and stop speaking to learn to bark, he may, like Kilito’s Bedouin, find that he has lost his ability to speak for good.¹⁰

6 Elizabeth Mertz, *The Language of Law School* (Oxford University Press, 2007) at p 101.

7 Elizabeth Mertz, *The Language of Law School* (Oxford University Press, 2007) at p 135.

8 Scott Turow, *One L: The Turbulent True Story of a First Year at Harvard Law School* (Pan Macmillan, 2014) at p 45.

9 Helen Sword, *Stylish Academic Writing* (Harvard University Press, 2012) at p 112.

10 Kilito Abdelfattah, *Dog Words* (Ziad Elmarsafy trans) (1981). See Angelika Bammer, *Displacement: Cultural Identities in Question* (Indiana University Press, 1994) at pp xxi and xxiii.

8 Mertz next examines the variety of teaching styles, notably the “stylized Socratic classroom” and the lecture style preferred by others. Within each group there are variations on the theme. Even teachers who prefer the lecture method “replicated aspects of dialogic form”.¹¹ The old-style “pure” Socratic method may have become the exception in present times. The decline has been documented as far back as 1999.¹² Mertz is sceptical about any conclusive finding of this decline.¹³ She expands her study by examining classrooms with various versions of the Socratic method and comparing them with the lecture method, including classes in which the professors speak 95% of the time and the students 5%. The objective was to discover “whether there are any apparent relationships between professors’ teaching styles and social patterns, such as school status”.¹⁴ Mertz concludes with the view that patterns of similarity across law schools seem to relate more “to where the professors were trained than where they are currently teaching”.

9 The next step is to inquire whether there are relevant patterns in the classrooms from the students’ participation. Classroom participation, Mertz observes, follow a general trend across educational institutions in America, and two significant factors that affect a general pattern are race and gender. Between these two, there seem to be more studies on gender differences and discrimination than there are studies on race. Confirming other studies, Mertz’s study finds that “male law students generally participate at greater rates than females”.¹⁵ She also finds evidence that the Socratic method may have a negative effect on women’s participation in the classroom. In the case of voluntary participation, women fared even lower, especially so in the elite law schools. Mertz finds that exceptions might occur but these seem to have come from non-elite law schools taught by female professors. Finally, in the inquiry into general patterns, Mertz finds that policies and practices of inclusiveness are complex: “A classroom can be quite inclusive along lines of gender but not race, and *vice versa*”.¹⁶ Mertz says that the general pattern, supported by other studies, links “increased class participation and classroom presence with traditional insiders in the legal profession; that is, white male students tend to dominate”.

11 Elizabeth Mertz, *The Language of Law School* (Oxford University Press, 2007) at p 141.

12 Orin Kerr, “The Decline of the Socratic Method at Harvard” (1999) 78 Neb L Rev 113.

13 Elizabeth Mertz, *The Language of Law School* (Oxford University Press, 2007) at p 144.

14 Elizabeth Mertz, *The Language of Law School* (Oxford University Press, 2007) at p 169.

15 Elizabeth Mertz, *The Language of Law School* (Oxford University Press, 2007) at p 190.

16 Elizabeth Mertz, *The Language of Law School* (Oxford University Press, 2007) at p 202.

10 The consequence of the unevenness of social patterns in the classroom is one factor impinging on the students' understanding of social issues. That is partly due to the way social conflicts are taught to them. In that context, Mertz examines legal language and American law in the final chapter of her book. In elite schools the focus is on learning to "cope with legal ambiguities and alternatives", whereas non-elite (lower-status) schools tend towards law practice and black letter law.¹⁷

11 How law is taught, who teaches it and who should study law are the variables that ride on what seems ostensibly a neutral, transparent medium – language – leading American citizens to "expect fairness and freedom to pursue justice".¹⁸ There is thus a central role for linguistic ideology in law schools to help produce lawyers with a clearer and better understanding of the social power of law through a better understanding of language and its social adherents such as economics, politics, psychology and history. Otherwise, there will be no answer to the:¹⁹

... uneasy paradox in which courts must all the time make decisions about issues that they are incapable of thoroughly grasping. Worse, it is possible that the system of legal language hides from them even the truth of their own limitations.

17 See also Alfred Smith, *Cognitive Styles in Law School* (University of Texas Press, 1979) for a comparative study of 22 law schools.

18 Elizabeth Mertz, *The Language of Law School* (Oxford University Press, 2007) at p 213.

19 Elizabeth Mertz, *The Language of Law School* (Oxford University Press, 2007) at p 206.