

Fall 2000

Making Culture Visible: Comments on Elizabeth Mertz's Teaching Lawyers the Language of Law: Legal and Anthropological Translations, 34 J. Marshall L. Rev. 119 (2000)

Susan F. Hirsch

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Legal Education Commons](#), [Legal History Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Susan F. Hirsch, Making Culture Visible: Comments on Elizabeth Mertz's Teaching Lawyers the Language of Law: Legal and Anthropological Translations, 34 J. Marshall L. Rev. 119 (2000)

<https://repository.law.uic.edu/lawreview/vol34/iss1/6>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

MAKING CULTURE VISIBLE: COMMENTS
ON ELIZABETH MERTZ'S *TEACHING
LAWYERS THE LANGUAGE OF LAW:
LEGAL AND ANTHROPOLOGICAL
TRANSLATIONS*

SUSAN F. HIRSCH*

INTRODUCTION

First, I congratulate the John Marshall Law School on the occasion of its Centennial and thank those who have invited me to participate in this symposium. It is a special pleasure to comment on Elizabeth Mertz's extraordinarily interesting and important paper.¹ She has produced a fine anthropological analysis of legal education as perceived through the lens of language. By refining her linguistic approach to a high degree of theatrical sophistication and applying it to the largely understudied venue of the law school classroom, Mertz demonstrates the productive and exciting reach of legal anthropology today. Through theoretical sophistication and analysis, Mertz identifies the decontextualization that plagues the law school classroom. In the context of the Centennial celebration's emphasis on legal education, Mertz's paper offers an excellent opportunity to reflect on pedagogy in the legal classroom. She offers a subtle and detailed analysis of classrooms in which the Socratic method is the primary discursive genre. On the one hand, her analysis reveals that the Socratic method is an even more effective tool for teaching certain fundamental principles of American law than many critics suspected. On the other hand, she expresses concern that the Socratic method's success in teaching "the language of the law" comes at the expense of students learning to engage in the ethical and moral issues inherent in legal conflicts.

Her unique training as both a lawyer and a linguistic anthropologist places Mertz in a unique position from which she can both expose this pedagogical dilemma and question whether

* Associate Professor of Anthropology and Women's Studies, Wesleyan University.

1. See generally Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91 (2000).

either the legal education system or doctrinal pedagogy can reconcile these contradictory effects of the Socratic method. At the same time, Mertz notes the inherent tension between law and anthropology. She worries—quite rightly—about whether the two perspectives can “translate” one another. Yet, rather than attempt to reconcile these disciplines in an effort to improve pedagogy in the law school classroom, it might be useful to draw on Mertz’s theoretical and methodological approaches in order to enable and encourage law students to take an anthropological perspective on their legal education.

I make these observations from the position of teaching anthropology at Wesleyan University in Middletown, Connecticut. Wesleyan is a small institution with a strong commitment to undergraduate liberal arts education. In recent years, I have given serious thought to the issues of pedagogy and curricular reform because Wesleyan has engaged in constructing a campus curriculum that increases multicultural offerings and addresses cultural and economic globalization more comprehensively.² As an anthropologist, I focus my curricular contributions on offering students a toolkit of methods and theories for understanding the complexity of the cultural contexts in which they and others live. At the heart of Mertz’s approach is a special attention to the nuances of local context, particularly to its cultural and linguistic entailments.

At least several times a year, I find myself, either in front of a class or with an individual student, making what I hope will be a convincing argument of why a cultural anthropology major is appropriate and, indeed, excellent preparation for becoming a lawyer. In an era when our Economics Department entices majors away from the so-called “soft” social sciences (e.g. anthropology), we occasionally engage in a bit of shameless marketing. However, until Mertz’s concern over the tension between the disciplines gave me pause, I believed, rather unthinkingly, in a close fit between anthropology and law. I believed that the study of the former was superb preparation for a career in law. Mertz’s article does not dissuade me from my belief in the complementary relationship between anthropology and law. Rather, she convincingly illuminates the deep schism between the respective worldviews of anthropology and law. This divide encourages me to re-examine the differences between the two courses of study and the implications for pedagogy. Much of my discussion draws on my experience as a teacher of anthropology who deals primarily with the education of undergraduates. Accordingly, in the back of my

2. See generally Susan F. Hirsch, *Finding Ourselves in Difference: Critical Ethnography in the New Century (condensed)*, WESLEYAN: THE UNIVERSITY ALUMNI MAGAZINE 10, 10-13, Fall 1996.

mind are several questions. Is anthropological training good preparation for law school? What does an anthropological perspective lend to our understanding of legal pedagogy? Finally, can law students make use of anthropological perspectives?

I. LANGUAGE IN THE LAW SCHOOL CLASSROOM

Mertz's paper provides fascinating answers to the question of what an anthropological perspective lends to the understanding of legal pedagogy. By subjecting law school pedagogy to the anthropological gaze, she illuminates in fine detail what many law professors do in their classrooms. The scope of her research project is very ambitious. The project's findings make it exceedingly powerful in several ways. First, by conducting research in numerous classrooms, which vary significantly from one another, Mertz positions herself to compare and contrast legal and anthropological education. Second, her use of linguistic methods subtly illustrates the detail of her arguments. Mertz's collections, transcripts, and analysis of linguistic data is impressive, and demonstrates her painstaking effort to satisfy the demands of methodical rigor and analytic creativity.³

Among the many insightful observations about legal pedagogy presented in Mertz's article, several significantly contribute to understanding legal pedagogy. Mertz shows how the Socratic method fosters an intrinsically decontextualized approach to morality as students learn to read, analyze, and understand the significance of cases. Finely detailed examples of actual speech from law school classrooms illustrate how this linguistic tactic trains students to perform "pragmatic" readings of legal cases.⁴ That is, they learn to seek out the legal authorities to which a case speaks as the primary method of orienting the law student to the case and the surrounding conflict in which the case arose. The linguistic interaction of a typical Socratic classroom tends to blunt, efface, and literally ignore the moral and ethical aspects of the conflict underlying each case. Because the legal authorities are, at base, what lawyers must attend, this seemingly uncaring method conveys a subtle and critical message that, in order to be successful, a student needs to hear and internalize.

What is ultimately most distinctive and powerful about Mertz's work is that her conclusions about the Socratic method emerge from an analysis of the pragmatic functions of language. Most lay people and even most linguists focus on what language

3. See, e.g., JOHN CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* (1990); SUSAN U. PHILIPS, *IDEOLOGY IN THE LANGUAGE OF JUDGES: HOW JUDGES PRACTICE LAW, POLITICS, AND COURTROOM CONTROL* (1998).

4. See Mertz, *supra* note 1, at 101.

means—its semantic sense—to the exclusion of what language does—its pragmatic sense.⁵ By examining the effects of Socratic interaction, Mertz makes profound conclusions that begin to account for the reasons that law professors continue this highly criticized method. In a brilliant stroke of analysis, she asserts the symbolic fit or resonance between the interactional form and function of the Socratic method and the broader logic of American law.⁶ Just as Mertz offers a thoroughly convincing argument for why the Socratic method continues to be employed in classrooms despite a range of complaints, she also identifies negative implications of the Socratic method, which are far more disturbing than those registered by students who simply view the experience as rude or demeaning. She suggests that without them even knowing it, students may slowly and subtly imbibe a particular legal worldview—one that tends to efface the ethical.⁷

Initially, this example stimulated me to think about how to inculcate my own students with a perspective, indeed a worldview, without them realizing it! But on further reflection, I wondered whether the spirit of education demands a more honest disclosure to students about both what they are learning and also the means of teaching employed. I am also leery of a method whose practitioners seem largely unaware of how it actually operates. Mertz addresses these issues as well.

Mertz raises very nuanced and compelling concerns about another potentially negative implication of the Socratic method. By removing analysis of the underlying conflict from its sociocultural context, the Socratic method fosters a kind of “cultural invisibility” in which the cultural background of litigants are important only in so far as they serve a particular legal argument. Mertz is equivocal here. Unmooring legal treatment from cultural context can be liberating: everyone is potentially treated the same. Yet a serious problem arises. How could one ever weigh the potential good of equal treatment against the erasure of cultural difference and moral reasoning? It might be useful on this point to offer more examples of the liberating possibilities of abstract equality. Such a recitation may be very basic for those working in the law. However, in the present-day roll back of affirmative action, it is instructive (and perhaps imperative) to re-examine how the legal notion of “treating

5. For exceptions, see SEMIOTIC MEDITATION: SOCIOCULTURAL AND PSYCHOLOGICAL PERSPECTIVES (Elizabeth Mertz & Richard J. Parmentier eds., 1985); NATURAL HISTORIES OF DISCOURSE (Michael Silverstein and Greg Urban, eds. 1996).

6. See Mertz, *supra* note 1, 93 (discussing the effects of the Socratic method on students).

7. See *id.* at 112 (maintaining that indoctrinating law students into the Socratic system tends to discourage a commitment to social justice).

everyone the same" is implemented through an abstract notion of equality and with what effects.

On this point it is useful to draw a comparison to how the Constitutional Court in the new South Africa addresses the concept of equality as that nation develops its Constitution and, specifically, its equality doctrine. According to Albie Sachs, the great jurist and anti-apartheid activist who is now a Justice on the Constitutional Court, the current section on equality is "just words words words," which the Court is struggling to interpret in ways that "consciously repudiate the history of apartheid South Africa."⁸ In their usage, equality means "equality across difference."⁹ In this fascinating moment, he and the other South African justices combine attention to notions of abstract equality and cultural difference as they interpret and develop South African constitutional law. Accomplishing this without being bound by precedent offers the South African Constitutional Court an especially broad and instructive context in which the tension between equality and difference may be explored.

II. MAKING CULTURE VISIBLE IN THE CLASSROOM

Turning back to Mertz's analysis, it seems to me that law teachers face a critically important dilemma about whether and how they help students to engage in ethical and moral claims. I learned from Mertz's ethnographic depiction of the law school classroom that, in comparison to law professors, undergraduate teachers face very different choices when teaching about morality and ethics. For me, these differences center around the treatment of the cultural and social contexts in the classroom. In teaching cultural anthropology, my central goal is to encourage students to appreciate the complexities of the cultural contexts in which real humans live. In this way, I encourage anthropology students to search within those contexts for explanations of human behavior. I push my students to think clearly about their own positioning in relation to any cultural context they study or encounter in their personal lives. By positioning, I mean their political responsibilities and ethical stances in relation to a particular context. I accomplish this by "making culture visible" in several ways.

For example, in my legal anthropology class, we routinely study Islamic society, through ethnography, attempting to understand it on its own terms.¹⁰ This undertaking always

8. Albie Sachs, Lecture at the University of Toronto Law School (October 1999).

9. *Id.*

10. See, e.g., JOHN BOWEN, MUSLIMS THROUGH DISCOURSE: RELIGION AND RITUAL IN GAYO SOCIETY (1993); SHAHLA HAERI, LAW OF DESIRE: TEMPORARY MARRIAGE IN SHI' I IRAN (1989); LAWRENCE ROSEN, BARGAINING FOR REALITY:

elucidates the complex relation between law, religion, and morality, given the ideological inseparability of these areas in the Islamic belief.¹¹ Anthropology courses challenge students to think about how Islamic law, arising from sacred sources, constitutes and represents the moral, the ethical, and the true. Though many students initially find this view of law unfamiliar, many eventually understand the law's position in the life of Islamic society. Given the contrast to their own experience, this understanding can only come when students approach the issue with some degree of cultural relativity. To guard against students setting up a stereotype based on a single example, my class always looks comparatively at several contemporary Islamic societies. In so doing, students learn to tease out the variation in cultural forms of Islamic law, particularly in multicultural contexts, where Islamic law is positioned in relation to secular systems, such as in Kenya and Tanzania, where I conduct my research.¹² With diverse examples, I attempt to demonstrate how people live within multiple normative orders that have different impact on their lives. The amount of variation in Islamic societies frequently surprises students. Additionally, they find that some examples challenge the stereotypes they routinely held about gender and Islamic law. Examples, such as women succeeding in lawsuits against men and young women fighting for the right to wear the veil in school, reveal the complexity of the law's role in constructing identity and inequality. Students with feminist commitments must struggle to clarify their positions in relation to these examples.

Anthropology courses encourage students to reflect on their own cultural circumstances with new perspectives through encounters with seemingly "different" societies. "Making the familiar strange" is a standard anthropological teaching gambit that uses intense engagement with a range of contextualized examples to encourage the student to see his or her own cultural context perhaps from a new, more skeptical, and more analytical perspective. Certainly, the Islamic example forces non-Muslim students as well as American Muslim students to think anew about the relationship between church and state, stereotyping, and inequality. Students are sometimes relieved at what they see as the moral underpinnings of the law in the United States, such as the abstract notion of equality. Also, the American legal system's approaches to personhood, race, and faith frequently horrify students when they discover that they have never realized

THE CONSTRUCTION OF SOCIAL RELATIONS IN A MUSLIM COMMUNITY (1984).

11. See generally CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY (1983).

12. See, e.g., SUSAN F. HIRSCH, PRONOUNCING AND PERSEVERING: GENDER AND THE DISCOURSES OF DISPUTING IN AN AFRICAN ISLAMIC COURT (1998).

such underpinnings in the legal doctrine of their own country.

It is especially valuable to allow students to explore questions of justice and morality in relation to concrete situations. On the Wesleyan campus, there is always a conflict brewing (or erupting) that is ripe for consideration. Not only are students more motivated to discuss conflicts that have immediate connections to themselves, but such discussions allow me, as the instructor, to appreciate the struggles and commitments that are their preoccupation, as inhabitants of our campus. All too often, we expect our students to check their politics and their identities at the classroom door. Since this is not really possible or even desirable, it is important, in some classes, to engage them directly.

For example, several years ago my "Discourse and Legal Processes" class abandoned discussion of readings on cases about hate speech to talk about the status of a Wesleyan-sponsored student residence called Malcolm X House. One of many interest-based residences on campus, Malcolm X House, has always been a favorite dorm for African-American students. Controversy began when a white student sought housing in Malcolm X and was turned down. In the midst of discussions over this decision, our university President sparked a campus-wide debate when he stated that he intended to "integrate" Malcolm X house. Our class discussion touched on many ethical dilemmas in the conflict: separatism and integration (among other political strategies); free expression and the potential silencing of views not deemed politically correct by Wesleyan standards; state law and campus or community autonomy; as well as housing discrimination and creating safe space. The discussion was heated. Although students sometimes ignored my attempts to direct them towards relevant concepts and readings from our course, it was gratifying that some combination of what we studied and what they experienced on campus helped them establish views of what was right, fair, legal, and possible in relation to this conflict.

Explicitly merging the campus context with the classroom context creates difficult and challenging interchanges. For example, during the discussion, one African-American student, who had been quite vocal in arguing for "X House" to remain exclusively African-American, refused to participate any longer. According to him, most students in the class did not have the life experiences—of, for example, racism, racial harassment, or top-down housing decrees—to understand the points he was making. Both white students and students of color objected, reminding him that the classroom itself was a place where people could learn about such experiences and could begin to develop approaches to conflict that would avoid or counteract further experiences of racism and oppression. Although unconvinced, he nonetheless rejoined the discussion, which continued to remain tense with

guarded overtones.

As the class period ended, I asked students to think about our classroom as a linguistic context. We spent the next class looking back at our discourse for clues about the meanings behind what had been said and how it was said. We talked about linguistic strategies, such as controlling the conversation, claiming authority, silencing, and refusing to speak. We discussed what these strategies might have meant and what they did or did not accomplish in the discussion. During this discussion someone asked me why I, as the instructor, failed to make the classroom a "safe space" where everyone felt free to speak. Another wondered why I had not created a "comfort zone." But I responded that instructors cannot guarantee safe space in or out of the classroom. This point allowed for a productive reconsideration of Malcolm X house as a safe space. Even though opening up the classroom in this way can lead to volatile discussions, this approach has the advantage of treating the students as whole persons with political and ethical commitments. The ability of my students to debate from their own standpoints starkly contrasts with Mertz's description of the severely delimited subject positions of student participants in the role-playing debates enacted in law school classrooms:

Each time a professor places a student in this landscape, the student must reorient herself and learn to focus on the details needed to shape a legal argument, convert social referents into legal categories, and discern the levels and types of authority. The human characters in the conflict story become strategic skeletons, defined by legally delimited contexts, shaped by their places in ongoing dialogic arguments. While role-playing in the classroom attempts to bring students to the level of actual people, the particular roles played omit many of the social particulars that shape not only social interactions, but also moral assessments of those interactions.¹³

III. MAKING THE CULTURE OF THE CLASSROOM VISIBLE

I turn now to another major point in Mertz's paper: her concern with who participates in law school classrooms. She combines her findings with those of other studies to conclude that, depending on the type of school and the instructor, white male students speak more in law school classrooms, especially in Socratic classrooms.¹⁴ She argues that the silence of students of color and white females can amount to another erasure of differences in experience and background from the context of legal

13. Mertz, *supra* note 1, at 107 (citations omitted).

14. See *id.* at 110 (discussing the tendency for white male law students to dominate classroom discussion).

education. She is cautious about the implications of this second form of “cultural invisibility;” however, she suggests that this participation structure conveys a powerful message about the central priorities of the law and about who is entitled to speak in law’s language.¹⁵ On this point, Mertz addresses my friendly critique of her use of the phrase “cultural invisibility,” as offered in the oral presentation of these comments. When I consider the classroom Mertz depicts, I do not think that culture—in the sense of cultural background that differs from mainstream white American culture—is invisible at all. For me, a particular cultural form that Mertz refers to as “dominant culture” is highly visible. Reflecting the priorities of the law, aspects of this cultural regime occupy virtually all of the space in the classroom. The white men comfortably control and manipulate classroom language in a decontextualized form, which tends towards disconnection from moral entailments. This *is* the culture of the law, and white men *are* its prime producers. Those who do not fit the categories are not, however, invisible; they are particularly visible at the fringes of the dominant culture. However, it is this dominant culture that takes up the majority of the classroom. Moreover, we cannot make assumptions about what cultural perspectives marginalized individuals might add by speaking. I am led to ask: When law students other than white men speak, will they offer anything different from the mainstream response? This question is particularly relevant for the Socratic classroom. The “democratization” of a classroom that relies on the Socratic method is unlikely to produce liberating or counter-hegemonic messages.

My point is not that students should sit in silence, especially women and students from underrepresented minority groups. However, to develop pedagogical reform that addresses their lack of participation requires knowing why particular students tend not to speak. The vast social science literature on participation in other classrooms offers a number of explanations that may or may not apply. Students might tend to orient themselves with one another through their silence, staking out identities as classmates. They might feel deeply alienated, as some indeed report in Mertz’s work. We might romanticize their silence as either conscious or unconscious resistance. Without knowing more about what they are experiencing, it is not clear whether any of these explanations is relevant. I have had students sit mute through four years of college classes and emerge with both a solid education and a radical critique of the silencing tendencies of elite institutions. So I never assume that students are not understanding fully—indeed, often they are *really* “getting it” when they sit silently. As Gramsci argued, alienation may be the first step in leading people

15. *Id.*

to become conscious of the contradictions that underlie their situation.¹⁶ Experiencing alienation might teach a student where to place himself or herself in relation to mainstream law as students and as practitioners. At the same time, he or she might develop a critique of legal education that, depending on career choice, contributes to significant change.

I am very curious about what these students are saying in the hallways, their clinical classes, their work experiences, their study groups, and their casual conversations. Is it the case that they are sorting out their moral and ethical stances on legal issues in these settings? If so, Mertz suggests that more support, validation, and guidance of these aspects of their law school experience appear warranted. But, as Mertz also says, there are no quick fixes. It is not for me to say; however, it seems that what is most troubling about the Socratic classroom *may not be* fixable. Given the deep resonance between the linguistic behavior inculcated in the Socratic classroom and the basic tenets of American law and society, this approach will likely hang on tenaciously.

CONCLUSION

There is another conversation I routinely have with students, especially in their senior year when some come to me for advice about applying to law school. I talk to them honestly and openly about the real differences between an undergraduate education in anthropology and the experience of law school. I tell them that most law professors will not indulge their attempts to resolve their own problems, identities, and anxieties in class or even out of class. Moreover, law professors will not provide a “safe space” for addressing political and personal crises that emerge in their law school experience. So I encourage them to be ready to use their anthropological skills to analyze the law school they choose to attend as an ethnographic context with its own culture, rituals, discourses, norms, and power relations. By taking the same perspective on their law school classrooms, they can sort out, for example, when abstraction is necessary and when other discourses are welcome. Through such analyses, they can also find places in which to act on their ethical, moral, and political commitments, and they can learn how to put the law school classroom in *its* place within the larger context of the communities in which they live.

Despite difficulties in translating between my own discipline

16. See JOHN COMAROFF & JEAN COMAROFF, OF REVELATION AND REVOLUTION: CHRISTIANITY, COLONIALISM, AND CONSCIOUSNESS IN SOUTH AFRICA 21-30 (1991) (discussing the approaches to culture, hegemony, ideology, and consciousness taken by thinkers like Antonio Gramsci). See generally ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey Nowell Smith trans., International Publishers 1971).

and the law, I will continue to believe that anthropology provides completely appropriate undergraduate training for those entering law school. Moreover, I am thrilled that I can help prepare students by assigning Mertz's paper the next time I teach "Legal Anthropology" or "Discourse and Legal Processes" to Wesleyan undergraduates. My students will greatly benefit, as we all have benefited from Mertz's writing. Mertz's scholarship will be a foundation for an ethnographic understanding of law school for those who will go on to enter that context. By contextualizing and closely analyzing this and other law school experiences, students may find productive and imaginative ways of engaging those issues effaced by the Socratic method. Such a goal seems to be encompassed in what Mertz intends when she writes:

[B]y integrating the perspectives offered by anthropology, the U.S. legal language, the legal system it encodes, and the educational institutions, which teach it, may respond to some of the most pressing challenges facing legal education today.¹⁷

Her article is an important step in that response.

17. Mertz, *supra* note 1, at 92.

