

SPECIAL SECTION: CULTURAL EXPERTISE

Foreword

Toward Reflexivity in the Anthropology of Expertise and Law

Kamari M. Clarke

The contemporary period is one in which truth is deeply contested as disputes over what constitutes “fact”—and who gets to decide—enter previously hegemonic spheres of knowledge and authority. As we see in the contributions to this special section, conflicts and transformations such as those highly visible in the media sphere, where high-office public declarations against “fake news” challenge fundamental assumptions about veracity, are also playing out in other neoliberal Western institutions, notably in the realm of law. As contributor Charles R. Hale argues, these tensions may be indexing the rapid decline of neoliberal multiculturalism, with profound implications. From paramilitary white supremacists marching on #charlottesville to the youth-catalyzed global solidarity of the #climatestrike, we are in a historical moment of intense mobilizations aimed at either opening or limiting the opportunities for social, environmental, and political change. Even as this moment inspires activist academics to find new ways of engaging our expertise toward real-world impacts, this moment concurrently raises urgent questions about unintended impacts and whether and how “change from within” is possible.

The discipline of anthropology remains uniquely positioned to reveal and grapple with these issues at every scale, from the embodied to the discursive and from the hyper-local to the global. The voices in this section collectively provide a rich, sophisticated, and nuanced examination of how particular forms of expertise and identity—including that of the activist anthropologist—are dialectically shaped through strategic engagement with Western legal institutions, and to what effects on subaltern and anti-imperial forms of ordering social relations. I share with these authors the experiences of being both ethnographer and at times advocate within this milieu. We ask ourselves: What is traded when we seek to facilitate urgent legal outcomes for the individual while participating in frameworks that may delimit long-term potential for systemic change? When a “cultural expert” assesses, for example, whether an asylum seeker’s

claims are legitimate or have been falsified, what are the ripples of impact? This special section opens a space for engaged anthropology to self-examine in a particular and timely way.

Within a historical moment of profound anxiety, as institutions posit an urgent need to legitimate truth through verifiable and corroborated fact, we see a concurrent spike in attention to expertise and authority. As the contributors illuminate, one arena related to the exponential expansion of a social preoccupation with verifiable knowledge concerns scientific and legal domains in which experts are being called on to corroborate evidence and establish particular possibilities for procuring the truth. The history of expert witnessing in common law systems has been heavily dependent on the increased control that lawyers have gained over time in the courtroom and, by extension, the increasing role that expertise is playing in supplementing statements of fact.

In Western traditions, expert witnessing, though not regulated until the twentieth century, has its roots in medieval juridical processes as a strategy to empower the “trier of fact” to make decisions that were beyond the ordinary degree of knowledge and experience. In the United States, the use of expert witnesses in the courtroom traces back to the 1692 witch trials of Salem, Massachusetts, where Doctor Brown of Norwich, Connecticut, classified as a “person of great knowledge,” first testified in a heresy trial. Acting as an aid to the court, he gave his medical opinion that a female defendant had bewitched victims (Rosenthal 1935, 409). In British common law courts, which spread throughout the British empire, modern scientific expert testimony underwent an eighteenth-century “adversarial revolution,” where judges took a more passive role in proceedings and lawyers became “adversaries” who argued their cases (Golan 2008, 879–83). The scrutinizing of lay witnesses developed into the increasing need for lawyers to produce “experts” whose words could be taken more seriously. These evidentiary developments produced two powerful doctrines: *the hearsay doctrine* and *the opinion doctrine*. Where the hearsay doctrine

worked to limit testimony based on personal observations, the opinion doctrine focused on controlling the structure of speech that expert witnesses used to communicate their perceptions to the jury (i.e., avoid inferences and privilege factual statements) (Golan 2008, 884). This led to the development of the “expert witness” into a distinct legal category of person who did not have to observe the case directly but could still testify to their opinion on its facts.

With the rise of modern science and technology, the purview of the expert witness narrowed toward a focus on observable phenomena in the physical world—expert witness as proto-scientist. The twentieth-century professionalization of science engendered a growing dependence on technical argumentation in the courtroom while also presenting new challenges around legitimacy and verifiability of data. The twentieth-century common law trial judge became an active gatekeeper charged with screening unreliable scientific evidence away from the jury. The late twentieth century into the contemporary period has seen the proliferation of DNA and digital technologies—including, most recently, drone technologies—that articulate new domains from which to establish veracity and render truth vivid through the expert’s translation.

Today, the justice system has come to depend heavily on expert witnesses. They are deployed in national, regional, and international courts to substantiate psychiatric or psychological assessments in criminal cases, to corroborate immigrant claims, to validate Indigenous-rights claims, to translate technical data, and so on. In the contemporary period, this facet of Western legal process is imbued with a power to assess the condition of the defendant and to make a declaration based on categories of court-recognized knowledge in relation to particular ontological foundations, specific ways of knowing and seeing that are concretized by and through the law. Expertise continues to be shaped and refined through the application of new scientific tools and societal perceptions of their validity.

An anthropology of expertise is concerned not only with making sense of what is seen through the eyes of experts but of *how* phenomena are seen and of the ideological structures through which these observations are made meaningful. However much legal argument would urge us to believe otherwise, evidence never “speaks for itself” (Clarke and Kendall 2019) but is always spoken of and for through performative expressions at the nexus of institutional alliances and ontological frameworks (Boyer 2008). The articles in this special section highlight the challenges that expert translation raises and, in particular, the difficult questions to be grappled with by anthropologists (Clarke 2017). They highlight the simultaneous dissonance and complicity between the purpose of the judicial system and the purpose of anthropology as a discipline. Where the court’s purpose is to establish hegemonic order through judgment, one of anthropology’s purposes is to illuminate alternative cosmologies and possibilities rendered by diverse subjectivities (Eltringham 2013, 339). Yet both are institutions with roots in positivism,

a common ground that anthropologists wade into with deep ambivalence when seeking to “use the law” for good.

Recent scholarship on expert witnessing—particularly as it relates to the fields of history, religion, anthropology, and cultural (in particular Indigenous) studies—has explored not just the production of knowledge and its epistemological struggles among various disciplines but also the legitimacy of the expert him- and herself and the knowledge modalities that are deployed to make their expertise tenable within particular hierarchized knowledge domains (Clarke 2017; Dumit 2004; Good 2006). By attending to legitimacy and power, anthropology points to political questions about expertise as well as substantive questions related to the nature of knowledge, its ontology, and the inability of both law and science to see beyond themselves. The anthropology of expertise investigates the production, capture, presentation, and defense of “facts” as an entry point to understand the ontological domains within which reality is housed and through which law’s limits are made evident. It is as much about the details that preoccupy the experts involved as it is about the locations of these data within matrices of global power (Weizman 2017). These articles are devoted to these complexities of object, space, power, performance, and reflection. They interrogate the relationships among various knowledge forms, the relevance of the anthropological experts who lay claim to and interpret cultural knowledge in particular, and the role of everyday citizens in producing or challenging evidence. If we consider these concerns in relation to the agency of people and communities whose claims are counterhegemonic, yet who find themselves negotiating the limits of legal frameworks, then the challenges both experienced and raised by anthropologists relate directly to issues of power. How do sociocultural, political-economic, and hegemonic factors shape the forms of expertise recognized by courts? How is power rendered legible and accessible (or inaccessible) through the force of law?

These questions have been debated across various disciplines with arguments revealing two ends of a spectrum: on the one hand, an assertion that legal knowledge should be controlled and interpreted within technocratic and legal spheres that are aligned with standardized presumptions of objectivity; on the other hand, an interest in how the proliferation of understandings about law and power might enable and delimit the democratization of knowledge forms that may be used before courts. Ethnographers interested in the study of expertise and evidence have revealed ways that scientists generate and validate knowledge (Latour 1988; Latour and Woolgar [1979] 1986), socialize new experts (Mattoesian 1999; Mertz 2007), represent specialized knowledge in broader society (Collins and Evans 2007; Coopmans et al. 2014; Lynch and Woolgar 1990; Randalls 2017), and imbue knowledge within institutional structures (Carr 2009; Good 2004a, 2004b, 2007), political movements, and processes (Collier 2017; Epstein 1996; Newman 2017). Experts are not on the sidelines offering counsel but are themselves central to shaping the frameworks that are used to legitimize

institutions. In light of this, anthropology is unearthing how the deployment of expert knowledge in the Global South can have highly unintended impacts as (post)colonial assumptions play out in particular cultural contexts (Mitchell 2002). And, as the contributors to this special section emphasize, these impacts sometimes originate with the participation of engaged anthropologists themselves.

Over the past two decades, a growing literature has begun to document civil society activities that are challenging the hierarchization of knowledge production and thus leading to ongoing contestations over what is admissible and important within legal realms (Clarke 2019; James 2010). We are seeing formerly disenfranchised groups mobilizing new tools to access and attempt to disrupt institutions of power (legal, scientific, religious) for the purposes of social change. Comparatively, the deployments of experts in global politics and judicial decision-making are diverse, in part because such expert knowledge is itself shaped by local conditions (Fourcade 2011), but also because motivations of experts themselves are diverse. A reliance upon experts by the NGO sector has created an industry motivated more by outputting projects than by achieving successes in terms of reaching desired goals (Krause 2014). The on-the-ground outcomes of the deployment of expert knowledge are unpredictable and at times spectacularly counter to stated aims as (neo)colonial assumptions play out in local cultural contexts (Mitchell 2002).

Despite the contemporary relevance of these topics, there have been few ethnographic studies of the processes by which expertise is actively negotiated in local, transnational, and international spheres. This lacuna points to a need to deepen our levels of inquiry into what expertise does in the world, and why, and the contributions here begin to point us in that direction. The articles examine emergent developments concerning evidence, expertise, and the processes by which legal knowledge and authority are established and defended (Fassin 2011; Latour 1993, 2005). They raise important questions about how expert knowledge, even when strategically deployed within a politics of solidarity aimed at supporting subaltern positions and advancing their interests, may ultimately serve to further reify hegemonic regimes. In the case of anthropological knowledge, we see cultural experts engaging in translation to render cases legible before the law. As Christopher Loperena outlines in the introduction to his article, underpinning this transactional engagement is a fundamental (if obscured) collusion between anthropology and the law. He writes, "Much of the scholarly debate concerning the role of anthropologists as experts hinges on the epistemological divide between the law and anthropology, in particular as it relates to competing conceptualizations of culture and the ethical and political contradictions that emerge from this mode of anthropological engagement.... Thus, the apparent contradiction between anthropology and the law distracts us from understanding the co-articulation of anthropological and legal ways of knowing and how this delimits, at least

partially, the types of dialogue that can take place across these two fields." Loperena and the other authors in this section present a sophisticated self-reflexivity around issues such as the "strategic essentialization" of culture.¹

Perhaps the most challenging aspect of being an expert witness is the constant struggle—and even angst—over the elusive territory of "objectivity" within which engaged ethnographers attempt "to pass," using their capacities as "neutral" translators and cultural mediators to attempt to intervene in power inequities. Hale, drawing from his experience as an expert witness in an Indigenous-rights trial and as a researcher engaged in the forest industry in southern Chile, examines the rise of judicial pluralism and the emergence of a sense of grassroots mobilization that both strategically uses and refuses the law. This article raises political questions about whether and how expert knowledge opens spaces to disrupt hegemonic and, by extension, to advance counter-hegemonic transformations. Similarly, Mariana Mora's article is interested in the role of anthropological knowledge in judicial domains and reflects on the words of a Mexican interlocutor who, in reflecting on the role of anthropologists in generating expert knowledge, asks why it is anthropologists and not Indigenous authorities who are being invited to interpret Indigenous cultural practices.² Mora critically examines Magdalena Gómez's concern with the introduction of cultural affidavits in Mexico in 1992 as a product of expert testimony. Through the examination of the rise of cultural affidavits, Mora raises questions about how anthropological expertise has come to mine the very rights it seeks to uphold. What we see is that the state's lack of substantial recognition of Indigenous authorities in courts has relegated them to the margins of legal struggles of Indigenous rights and self-determination.

The commentary by Juan Carlos Martínez illuminates these issues through a discussion of the judicialization of Indigenous rights in Latin America. Martínez asks whether subaltern communities truly have a choice around petitioning for legitimacy within neoliberal judicial institutions. His introduction offers moments of insight—and even hope—with regards to the possibility of a politics of solidarity, exploring whether, why, and when the strategic application of "cultural expert" and "legal-anthropological expert" witnessing may succeed in not only advancing the goals of individual cases but in defending the right of alternative cosmologies to exist.

How is anthropological knowledge being mobilized? What are the implications for the production of such knowledge forms in relation to culture and power? And what does this tell us about the limits of the law—and also the possibilities of genuine social change—in the contemporary period? These questions implicate some of the most difficult issues of our time, issues that relate to the continued impacts of European modernity and scientific positivism, the derogation of Indigenous and subaltern forms of knowing and being, and the attempts by anthropology to somehow bridge the gap toward alternative futures.

Kamari M. Clarke Department of Anthropology, University of California, Los Angeles, CA 90095, USA; kamariclarke@ucla.edu

NOTES

1. "Strategic essentialism," a major concept in postcolonial theory, was introduced in the 1980s by the Indian literary critic and theorist Gayatri Chakravorty Spivak. It refers to a political tactic in which minority groups, nationalities, or ethnic groups mobilize on the basis of shared gendered, cultural, or political identity to represent themselves. While strong differences may exist between members of these groups, and among themselves they engage in continuous debates, it is sometimes advantageous for them to temporarily "essentialize" themselves and to bring forward their group identity in a simplified way to achieve certain goals, such as equal rights or antiglobalization. See: <https://literariness.org/2016/04/09/strategic-essentialism/>.
2. Comments made during Gómez's intervention in the forum "Identity, Territory, and Jurisdiction: The Role of Anthropological Expert Knowledge for the Implementation of Collective Rights of Indigenous Peoples," March 2015. Video clips of the event are available at: <http://fundar.org.mx/foro-internacional-identidad-territorio-jurisdiccion-06-de-marzo-900am/>.

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