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CULTURAL EXPERT
WITNESSING**

STUDIES IN LAW, POLITICS, AND SOCIETY

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SPECIAL ISSUE: CULTURAL EXPERT WITNESSING

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CONTENTS

EDITORIAL BOARD	<i>ix</i>
LIST OF CONTRIBUTORS	<i>xi</i>
INTRODUCTION: CULTURAL EXPERT TESTIMONY IN AMERICAN LEGAL PROCEEDINGS <i>Leila Rodriguez</i>	<i>1</i>
EXPERT WITNESSING IN HONDURAN ASYLUM CASES: WHAT DIFFERENCE CAN TWENTY YEARS MAKE? <i>James Phillips</i>	<i>11</i>
JUDICIAL ETHNOCENTRISM VERSUS EXPERT WITNESSES IN ASYLUM CASES <i>Murray J. Leaf</i>	<i>49</i>
GUILT, INNOCENCE, INFORMANT <i>Jeffrey H. Cohen and Lexine Trask</i>	<i>101</i>
TRAVERSING BOUNDARIES: ANTHROPOLOGY, POLITICAL ASYLUM AND THE PROVISION OF EXPERT WITNESS <i>Kathleen M. Gallagher</i>	<i>115</i>

PROVING “RACE” IDENTITY OF CHINESE INDONESIAN ASYLUM SEEKERS <i>ChorSwang Ngin</i>	133
STATE YOUR CASE: BEST PRACTICES FOR PRESENTING A CULTURAL DEFENSE IN CRIMINAL LITIGATION <i>Heather Crabbe</i>	165

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INTRODUCTION: CULTURAL EXPERT TESTIMONY IN AMERICAN LEGAL PROCEEDINGS

Leila Rodriguez

In the United States, much of our social life is shaped by how we address and manage cultural difference. Perhaps nowhere is the management of multiculturalism more important than in legal proceedings. While there are many ways in which cultural accommodations are made at trials (e.g., see [Berk-Seligson, 2002](#), regarding the use of interpreters during judicial proceedings), this special issue is concerned with just one: the use of cultural expert testimony as evidence in legal conflicts that invoke cultural difference. The articles in this issue address six aspects of its implementation which must be resolved to improve its efficacy: knowing the role of expert testimony in a cultural defense, reconciling the job of expert witness with other professional roles, relating to defendants vs. informants, employing legal concepts that have little anthropological acceptance, producing testimony in changing historical and political contexts, and helping judges understand culture.

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THE VALUE OF CULTURAL EVIDENCE

The use of expert witnesses in the Anglo-American system of adjudication is tied to the development of the jury system (Rosen, 1977). Because experts are considered to possess specialized knowledge and experience, judges and juries rely upon them to clarify and illuminate complex issues that arise in trials (Needham, 1997). The majority of cultural evidence in civil and criminal cases forms part of a cultural defense, which Renteln (1993, p. 439) defines as “the defense asserted by immigrants, refugees, and indigenous people based on customs or customary law,” and which ensures consideration of cultural evidence in the court of law (Renteln, 2005). In particular, it invokes culture as a partial defense and opens the objective reasonable person standard to other viewpoints (Renteln, 2004).

While Renteln’s definition of the cultural defense is a valuable analytical concept, it relegates “culture” to something only associated with ethnic or national identity. This is also reflected in her “cultural defense test” to avoid abuse, whereby courts would consider three queries: (1) Is the litigant a member of the ethnic group? (2) Does the group have such tradition? and (3) Was the litigant influenced by tradition when he or she acted? (Renteln, 2005, pp. 49–50). This “test” places even stricter limits on “culture,” associating it with ethnic identity only. Elsewhere, her work has also been criticized for relying on outdated theories of culture that view it as a property of individuals rather than collectives (Rosen, 2006).

Despite the shortcomings of Renteln’s conceptualization of the cultural defense, it remains an important concept to understand a crucial issue: in what ways, and to what extent, cultural background should be taken into consideration in the response to a legal conflict (Rosen, 2006). The importance of presenting cultural evidence in American legal proceedings cannot be overemphasized. The United States is one of the most diverse countries in the world. Data from the 2010 Census shows that 72% of Americans identify as “white,” 13% as “black,” 5% as “Asian,” and 0.9% as Native American. In total, 16% identify as Hispanic (Humes, Jones, & Ramirez, 2011). The foreign born account for 13% of the total population, and they hail from every corner of the world (Grieco et al., 2012). Diversity will only continue to grow, and by 2044 over 50% of the American population is projected to self-identify as belonging to a minority ethnic group (Colby & Ortman, 2015). Religious diversity is also widespread and shifting. In a 2014 Pew Research Center survey, almost 71% of Americans identified as Christian, 23% as unaffiliated, agnostic, atheist or similar, and almost 6% as practicing another religion. This represents a shift from the results 7 years earlier: an 8% drop in

Christians, 6% increase in unaffiliated, and the largest (but still modest) gains among other religions occurring among Muslims and Hindus ([Pew Research Center, 2015](#)). Current and future shifts in the ethnic and religious composition of the United States, among other cultural identities, inevitably will lead to judges and juries encountering increasingly culturally diverse people in their courts and needing increased help in understanding their cultural backgrounds.

In addition, cultural background should not be an impediment to receiving equal justice. In the United States, “equal justice under the law” is one of most firmly embedded legal principles. [Rhode \(2004\)](#) argues that it is also one of the most violated ones. She attributes this to the inequitable distribution of legal services in the country. By her estimates, some four-fifths of the legal needs of the poor and two-thirds of those of the middle class remain unmet ([Rhode, 2003](#)). Even when people receive their day in court, they do not always leave with the feeling that justice has been done. Money and special interests in legal proceedings are strong barriers to equal justice ([Rhode, 2004](#)). Class is not the only problem, however. Culture acts as a barrier to equal justice because lawyers, judges, and juries all too often ignore important facts about the cultural background of those they serve. Part of the problem is that the legal profession remains astoundingly undiverse, and [Rhode herself \(2015\)](#) has argued that this is especially problematic because the legal profession supplies presidents, governors, lawmakers, judges, prosecutors, general counsels, and heads of corporate, government, nonprofit, and legal organizations that serve increasingly diverse populations. [Chin \(2004, p. 654\)](#) offers a partial solution: the presence of a “cultural ombudsman” in courts who advocates on behalf of minority defendants and helps them navigate “the labyrinth of the American criminal justice system.” I believe that another part of the solution lies in the increased use of expert witnesses and cultural evidence in legal proceedings.

Over the past several decades, primarily but not exclusively anthropologists have served as cultural expert witnesses on a plethora of civil and criminal cases. Scholarly publications suggest that the vast majority of these experts have been called upon in asylum cases ([Alvarez & Loucky, 1992](#)). This issue reflects that, as four of the essays included are written by anthropologists who have worked on asylum cases. Other cases that have employed cultural expert witnesses include indigenous child adoption practices ([Morrow & Pete, 1996](#)), sexual abuse ([Rodriguez, 2014](#)), land claims ([Feldman, 1980](#)), homeless right to shelter ([Hopper, 1990](#)), and death penalty ([Keefe, 2011](#)), among many others (see [Renteln, 2005](#) for numerous other case examples).

NEW PERSPECTIVES ON CULTURAL EXPERT WITNESSING

This issue of *Studies in Law, Politics, and Society* presents theoretical progress on the use of cultural anthropologist as expert witnesses. The essays that follow do not simply describe the cases in which contributors have served as expert witnesses. Rather, they advance the conversation by using their experiences as witnesses to critically examine some conceptual, practical, and ethical challenges of this work.

In Chapter 1, James Phillips takes a diachronic perspective and examines how a 20-year difference and changing conditions in both Honduras and the United States, and their relationship with each other, affect the work of serving as cultural expert in asylum cases. He argues that expert witnesses need to be attuned to how changing sociopolitical contexts can shape the type and nature of asylum cases; he highlights the need to conceptualize and characterize legal constructs such as *political opinion*, *targeted social group*, and even *targeted violence* in ways different from those of the recent past.

In Chapter 2, Murray Leaf confronts the problem of judicial arbitrariness in asylum cases, which he deems an injustice. Providing detailed accounts from his own experiences as expert witness on asylum cases involving South Asians, he traces the arguments that immigration judges have used to accept, ignore, or reject the expert evidence. Leaf describes how factual and logical errors appear in the judgments of asylum cases and proposes a greater and more efficient use of expert witnesses and training as a remedy.

In Chapter 3, Jeffrey Cohen and Lexine Trask encourage anthropologists to consider how the anthropologist–defendant relationship differs from the anthropologist–informant dynamics to which we are more accustomed. Contrasting their experiences as expert witness, consultant and academic researchers, they examine parallels and differences in the meeting and selection and assumptions of guilt of informants and defendants or clients, how the individual reflects the groups, and the outcomes of our professional involvement with them.

In Chapter 4, Kathleen Gallagher urges anthropologists to reflect upon the boundaries between law and the social sciences. Using her experience as expert witness in the asylum case of a Nepali woman, she argues that the tensions between law and social sciences, particularly those regarding social facts and the production of logic, can be reconciled in the process of crafting the expert testimony.

In Chapter 5, ChorSwang Ngin further examines the tensions between law and anthropology by focusing on a single concept: race. Employed in the 1951 Refugee Convention but rejected by anthropology, the concept presents a challenge to the cultural expert witness crafting an affidavit. In her essay, she recounts her experience having been asked to prove a Chinese

Indonesian's "race" and how she resolved this conundrum by combining an innovative theoretical framework with observations of the everyday practices of the asylum applicant.

Finally, Chapter 6 provides the other perspective: that of a lawyer who describes the pretrial litigation, qualification of expert witnesses, trial, sentencing, and appeal procedures in cases that involve cultural defenses. In this chapter, Heather Crabbe further compares lay testimony, expert testimony, and other evidence that can be presented on behalf of a person seeking to invoke a cultural defense to explain a defendant's *mens rea* or state of mind.

FUTURE DIRECTIONS

While these essays represent important contributions to our critical examination of the role of cultural expert witnesses, they also raise a number of scholarly and practical questions about this work. Below, I outline some new areas of inquiry and further work that can be done, including research needs and an agenda for practicing anthropologists and other social scientists who serve as cultural expert witnesses.

Compare Legal Stakeholder Perspectives

Crabbe's essay in this issue provides the insight of one lawyer about one important function of cultural evidence. Scholarly research is needed to compare the perspectives of all legal stakeholders, lawyers, judges, experts, and defendants about the appropriateness of cultural evidence, the value of cultural evidence vis-à-vis other types of evidence, and the weight that cultural evidence should be given under different circumstances. Further research is also needed to examine how culture enters legal proceedings not just by affecting the actions of defendants but also by shaping the perceptions and actions of lawyers and judges of defendants and of the cultural evidence.

Compare the Work of Cultural Expert Witnesses in Different Countries

Cultural expert witnesses are readily employed in many European countries, Australia, and Latin America, among other regions. [Holden \(2011\)](#) edited a book that includes case studies from various European countries that involved cultural expert witnesses. [Edmond \(2004\)](#) uses a case in Australia as analysis

of the judicial system's response to anthropological expertise. Good (2004a, 2004b, 2007) has done extensive work on objectivity and the legal system's use of anthropological experts in asylum cases in the United Kingdom. In Latin America, the work of expert witnesses is much more institutionalized and regulated, with universities offering courses or certificates that train students in this matter. Following the "Rules of Brasilia," adopted at the 2008 Iberoamerican Judicial Summit (see [CJI \(Cumbre Judicial Iberoamericana\), 2008](#)) many Latin American countries have been more explicit in allowing cultural expertise (commonly referred to as *peritaje antropológico* or *peritaje cultural* in Spanish) in their legal proceedings (though earlier international agreements laid the legal groundwork for it). These rules promote the access of people in conditions of vulnerability to the justice system. The vast majority of the cases have involved indigenous peoples, but not exclusively. More has been published in the region than in the United States regarding this work. Pérez and Mayorga (2013) discuss their experience with the first case in Costa Rica in 2010 that actually employed cultural expertise. They advocate for the role of cultural expert witnesses in identifying the intangible patrimony of indigenous peoples. Valladares de la Cruz (2011) evaluates cultural expert witness testimony as a tool to construct societies that are more respectful of cultural diversity and argues that it should furthermore be employed to construct judiciary plurality in Mexico. Sánchez Botero and Gómez Valencia (2008) published a book that summarizes and critically engages the numerous cases in which they have worked as cultural expert witnesses in Colombia. Nukada (2015) summarizes the rise of the use of cultural expertise in Costa Rican trials. The international literature is vast and I cannot pretend to describe it all here. Suffice it to say that as a pillar of the anthropological perspective, we can only benefit from comparative analyses between uses of cultural evidence in the United States and that of other countries. One particular area of comparative inquiry involves the use of cultural expert testimony and evidence in adversarial versus inquisitorial or nonadversarial legal systems.

*Investigate the Role of the Daubert Ruling on
Admission as Cultural Experts*

In the United States, the Daubert standard created after the Supreme Court's decision in *Daubert v. Merrill Dow Pharmaceuticals* provides a rule of evidence regarding the admissibility of expert witnesses' testimony (Needham, 1997). Trial judges are the final arbiter or "gatekeeper" on admissibility of evidence and acceptance of a witness as an expert within their own courtrooms. According to this standard, judges should consider the scientific

validity and acceptance of the theory or technique employed by the expert witness. The 1999 Supreme Court ruling in *Kumho Tire Co. v. Carmichael* further expanded the applicability of the Daubert test to nonscientific evidence (DeVyver, 1999). How do judges differentially apply the Daubert standard to “softer” disciplines like cultural anthropology? Given the range of epistemological perspectives in our discipline, which anthropologists get their day in court? We need further research in this area.

Expand the Range of Populations that Can Access Cultural Arguments on their Behalf

As practitioners, anthropologists, and other social scientists, we can expand the scope of our work. One way to do this is to expand the populations for which cultural expertise is invoked. Anthropologists have already begun the work of expanding the range of populations that can access cultural arguments. At the 2015 Society for Applied Anthropology annual meeting, Thu (2015) presented his experience successfully arguing, as expert witness, that concentrated animal feeding operations create “nuisance” conditions for neighbors whose quality of life has been degraded. Anchored in Common Law, nuisance is defined as the unreasonable interference with the comfortable enjoyment of life or property. His expert testimony was based on interviews with rural residents and how they culturally define expectations for quality of life in the rural Midwest (Thu, 2015). His testimony, in essence, asserted the existence of *rural Midwestern culture*.

Share Our Best Practices for Serving as Cultural Expert Witnesses

Much like fieldwork, it seems the actual steps involved in crafting cultural expert testimony are somewhat obscure and often undisclosed. To improve our role as cultural expert witnesses we should reveal the specific work we conduct to present cultural evidence and develop frameworks of best practices. Rosen (1977) proposed some standards and reforms to this activity. They include the exclusive use of court-appointed experts (instead of adversarial experts), a pretrial conference among experts and representatives of the contending parties, full discovery of expert testimony before the trial, and the permission for experts to present their testimony in narrative, and not interrogative form. Renteln (2005) provides a normative framework for the analysis and resolution of disputes where cultural defenses have been invoked. In particular, she advocates for the

“maximum accommodation of cultural differences,” the requirement that the judiciary at least consider cultural evidence, and that all legal actors receive formal cultural awareness training, including cultural questions on the bar examination. While these improvements are aimed at the courts, what similar standards and reforms could we suggest for anthropologists?

Few of the published accounts of experiences as cultural expert witnesses make explicit the steps taken in crafting the written or oral testimony. [Rodriguez \(2014\)](#) used cultural consensus analysis to collect the necessary data for a defense lawyer. [Keefe \(2011\)](#) constructed life histories as a means to situate the defendants’ lives within cultural context. Ngin (this volume) observed the daily practices of an applicant for asylum. Other experts (e.g. Gallagher, this volume) mention the collection of published research, human rights reports, and other secondary data to craft their testimony. Making our methods explicit is particularly important because our traditional training as cultural anthropologists emphasizes long-term, in-depth ethnographic fieldwork that does not fit well with the time constraints in legal proceedings that frequently demand expert testimonies within a short period.

Train Cultural Anthropologists to Serve as Expert Witnesses

Training for cultural expert witnesses should also be improved. [Kuo \(2004, p. 1298\)](#) discusses her experiences teaching the cultural defense in law classes. She states that “[l]aw students learn to identify and define people, places, and events by legal categories and to transform stories of conflict into legal arguments. By legally parsing facts, they learn to siphon off the emotional and cultural content—both in the stories themselves and in their reactions to the stories.” Her students, in other words, ignore culture.

As an anthropology professor, I ask the same of our students and our classes. Don’t most of our students ignore law? How frequently is the cultural defense taught in anthropology classes? How much do future cultural expert witnesses understand about the legal system and the role of their testimony? [Rosen \(1977, p. 555\)](#) detected this issue many decades ago, when he wrote that anthropologists “may not understand how expert testimony fits together with judicial reasoning and legal precedent, and precisely how the court’s investigation of the facts articulates with the form of knowledge he possesses.” As expert witnesses, we need our expertise to go beyond a particular topic or population to incorporate a deep knowledge of the legal system in which we operate and serve. Perhaps paradoxically, we need to understand the *culture* of the legal system and its stakeholders. Social scientists and lawyers are trained differently and

differ greatly in their professional values and customs – in their professional *culture*. At their core, law is irrational, specific, idiographic, normative, and prescriptive, and science is rational, abstract, nomothetic, value-free, positive, and descriptive (Erickson & Simon, 1998). Cultural anthropological practice ranges from positivistic to interpretive. Without this understanding we cannot fully grasp the potential impact of our testimony. Some training does exist: at the Society for Applied Anthropology's 2015 annual meeting, for example, a workshop on expert witness work was offered. Our discipline and our clients can only benefit from anthropologists expanding training in this area.

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