

2016

## Ian Harper, Tobias Kelly & Akshay Khanna's *The Clinic and the Court: Law, Medicine, and Elizabeth Mertz, Anthropology & The Role of Social Science in Law* (review essay)

Anya Bernstein

University at Buffalo School of Law, anyabern@buffalo.edu

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### Recommended Citation

Anya Bernstein, *Ian Harper, Tobias Kelly & Akshay Khanna's The Clinic and the Court: Law, Medicine, and Elizabeth Mertz, Anthropology & The Role of Social Science in Law (review essay)*, PoLAR (2016).

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**Anya Bernstein**

*SUNY Buffalo Law School*

The Clinic and the Court: Law, Medicine, and Anthropology.

Edited by Ian Harper, Tobias Kelly, and Akshay Khanna (Cambridge: Cambridge University Press, 2015)

The Role of Social Science in Law

Edited by Elizabeth Mertz (Burlington, VT: Ashgate, 2008)

As the internal workings of the state—and not just the state’s effects on others—become ever more central to anthropological inquiry (Bernstein & Mertz 2008), the social production of legal strictures also becomes an increasingly important area of study. Legal pronouncement, after all, is one of the primary languages spoken by the state. And, like many pronouncements, legal strictures attempt both to represent the world and to intervene in it (Hacking 1983; Constable 2014). Any legal pronouncement, after all, rests on some understanding—perhaps implicit—of the object it refers to.<sup>1</sup>

How do these understandings come about, though, and how do they affect the way that laws are formulated and carried out? Scholars have taught us a great deal about how law wends its way through the world: how law on the books is changed upon the blue guitar of its many contexts. Two recent books present an opportunity to think in the other direction, asking how context—the world law addresses—makes its way into legal understandings, strictures, and interpretations. One edited volume focuses on medicine; the other on social science. Each shows how expert discourses interact with the expert discourse of law, being shaped by it and shaping it from the inside. And each provides a chance to consider *how* we can study the role of context in law: how to recognize moments where legal actors pick out aspects of the world as relevant, how to evaluate their interpretations of those aspects, and how to trace those interpretations as they make their way into the law.

*The Clinic and the Court* examines how medical expertise interacts with legal process. Its chapters discuss public health regulations as sites of cultural control and cultural expression; the uneasy implication of medical practitioners in establishing legally cognizable offenders and victims; the integration of psychological categories and treatments as terms in legal systems; and the mobilization of legal process in the provision of medicines and medical decisions. Each chapter brings face to face two expert discourses, each of which sometimes claims for itself a uniquely powerful, monolithic status. The challenge, then, is to believe neither at the same time: to show how both have porous borders, internally complex organization, and characteristics that are subject to change. That means imagining law and medicine not as two complete, bounded wholes colliding on the field of the social, but as continuously interpenetrating influences on partly formed, partly developing tendencies.

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<sup>1</sup> Sometimes the object implicitly figured in a legal pronouncement differ from the one its strictures refer to. In my own research (Bernstein 2008), for instance, I found that legal strictures governing urban space in Taiwan were primarily addressed to an imagined community of international observers whose legal ideologies were seen to crucially affect Taiwan’s sovereignty. In contrast, the law did not attempt to represent the actual spatial world that denizens and developers of the urban space lived in, and was enforced irregularly and unenthusiastically.

Some chapters set up an epistemological contrast in which legality's demands for certainty and closure dominate and pervert the empirical, realist impulses of medical practice. Medical actors are uncomfortably interpellated by legal process in Tobias Kelly's *The Causes of Torture* and Estelle d'Halluin's *Local Justice in the Allocation of Medical Certificates*, in which British and French doctors, respectively, are asked to pass judgment on the medical claims of asylum seekers. For Kelly, immigration agencies' need for legal certainty—*has* this person in fact been tortured?—overwhelms medicine's recognition of the inherently inconclusive character of many physical symptoms. Doctors are loath to assign a single ultimate cause to symptoms that could result from several events, but that medically proper reluctance ends up supporting a structural suspicion of asylum claimants' honesty. D'Halluin's doctors distribute their scarce resources among too many applicants. That resource pressure makes medical centers, the "gatekeepers" to the asylum process (119), inconsistent in how they approach their obligations to asylum seekers and the legal system they supplicate—obligations that are themselves often incongruent. Patients, as medical actors, are no better off. In Naomi Richards' *Dying to Go to Court*, a terminally ill British woman decides against seeking medical assistance in ending her life out of fear that her husband would be prosecuted for accompanying her. Chapters like these show how the blunt demands of the legal system can distort the more subtle realities of medical practice.

But the most illuminating essays for me were those that managed to also show the subtleties of the legal field, and to demonstrate how it, too, is changed through interaction with other discourses. In João Biehl's *Juridical Hospital*, Brazilian lawyers use their Constitution's guarantee of "health" that force the government to provide medicine to the poor—cases that make legal judgment turn on medical need. Judges are asked to collaborate with prescribing physicians against the stingy state, whose administrators resist spending public money on expensive drugs. The case-by-case work and individual rationalities of judges obstruct administrators' attempts at generalized, rational budget planning (182-185).<sup>2</sup> They also portray the right to *health* as a right to *medicine*—a pharmaceutical framing that displaces other available definitions, such as preventive care or health-sustaining economic distribution (174). Thus, legal conceptions emerge from an internally differentiated field of institutions whose power relations develop over time. And they are shaped from the inside by the medical discourse, with its own peculiar economic structuring, which influence how the law understands the context of health.

In a similarly interactive vein, Gethin Reese's *Contentious Roommates?* explores the practices of forensic nurses working with sexual assault victims in Canada, England, and Wales. Treating injuries, discussing health effects, and collecting evidence for possible prosecution, these nurses work at the medical-legal boundary. Sometimes they enforce that boundary: they legalistically ensure that a rape kit produces juridically cognizable evidence, but keep police out of the room for what they deem to be the clinical, rather than the legal, part of post-assault treatment. Other times, they negate the medical-legal boundary by letting the victim, rather than the expert discourse, determine their practice. The client-centered attitude focuses on the victim's comfort, needs, and decision-making capacities across

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<sup>2</sup> Of course, the way that legal process can recognize socioeconomic rights itself depends on local conceptions of law. Brazilian courts, Biehl implies, have read Brazil's Constitution to impose positive obligations on the state—something American courts have resisted for their Constitution (Weinrib 2015).

discursive fields. It illustrates how both medical and legal practices are developing as practitioners recognize their deep interconnection.<sup>3</sup>

At their best, then, this book's chapters think of law and medicine as two internally variegated discourses, each in motion, entering one another in ways that change both. In this, they sometimes exceed the editors' introductory framing, which posits that "legal decision-making is a process of trying to move beyond questions of fact as fast as possible, in order to arrive at legal debates" (8), and that law attempts to work with "near total self-referentiality" (9). As individual chapters demonstrate, though, this image paints things a bit too cleanly, ignoring internal differentiations in principles, personnel, trope, and scope.

Context, after all, enters different legal institutions in different ways. Courts may be nominally limited to the law and the case record, but in fact judicial opinions often rest on judges' understandings of the world and their research into it. More importantly, courts are not the only, or even the most important, law-producing institutions. Legislatures have something to do with law as well (Gershon 2011). And administrative agencies produce many more pronouncements with legal effect than do courts or legislatures. In this book alone, they regulate refugees and criminals, public health and reparations: administrative management permeates just about all the legal processes discussed here. And agencies' relation to contexts like medical knowledge can vary even more than courts'. Far from striving for self-referentiality, agencies often work through experts to collect, direct, and perform research. They are surely bound by their own logics, such as cost-benefit analysis or proportionality; but those logics do not necessarily partake of the self-referential phrasing of doctrine. Such internal tensions and transformations are difficult to recognize if one speaks of "law" as a fixed, unitary attitude, as the editors sometimes do.<sup>4</sup>

*The Role of Social Science in Law* draws together twenty-four previously published articles that range widely across discipline, method, topic, publication, and date. Each of the book's four parts pairs a section that explores a general concept with another section that considers that concept in a specific area of (mostly American) legal life: the death penalty, discrimination, domestic violence, and social struggle. Many chapters here examine the structural and discursive constraints that shape legal actors' uptake and evaluation of social science research, and how those constraints shape the uses, and the integrity, of that research in the law. These essays show how legal practitioners often lack the tools to evaluate the quality of social science research, and how the narrative and argumentative forms of legal discourse tend to push understandings of social science into narrow, decisive framings that pervert the methodologies of the social sciences and undermine their findings.

Others show how knowledges and narrative forms compete on the field of legal stricture and obligation, pointing out how legal process itself can validate particular forms of

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<sup>3</sup> Contrast this with the legal focus of the American forensic nurses discussed in Sameena Mullah's *The Violence of Care* (2014). In the U.S., "medical-legal partnerships" approach the interconnection from the other side: these involve lawyers who place themselves in medical settings to try to harness legal process to address socioeconomic aspects of health maintenance, such as housing and employment.

<sup>4</sup> On the other side, while the editors seem to view medical discourse as inherently evidence-based, humble before the complexities of its object, in fact medicine can also create brittle categories that seem impervious to empirical realities. As anyone with a chronic pain condition knows, for instance, many medical professionals have difficulty acknowledging things they cannot fix.

understanding and give them new powers through their role in the law. This validation can be salutary, as when courts recognize new knowledge about the disempowered, but it can also perpetuate unfairness, as when agencies devolve responsibilities onto private parties but enforce their own idiosyncratic expertise. Other essays examine the power of legal discourse to shape social categories and cultural identities, as well as the sometimes oppositional responses that power can elicit. Still others here turn their attention to the production of expert discourses themselves, asking legal academics to study the social structure of the legal profession and social scientists to see the law as a cultural formation with multiple meanings.

As this description of themes suggests, there is something in this wide-ranging book for everyone interested in the interaction of these disciplines. Elizabeth Mertz's comprehensive, thoughtful introduction ties these diverse works together through the theme of *translation*. The thrust of the book, she explains, is to examine whether, and how, law and social science can incorporate one another's findings, methods, and attitudes without fundamental distortions that undermine their value and validity.

Appropriately enough, Mertz herself seems unsure of the answer: the introduction is part hope, part despair. And the chapters point at least as much to disciplinary divides and distortions as to interactions and collaborations. Edward Rubin's *Law And and the Methodology of Law* posits that law's relation to social science is paradoxical at its heart. Legal scholarship's "unique," prescriptive "stance...toward its subject matter...precludes the direct application of another field's methodology" (177), yet scholars cannot talk about law without talking about its relations to the world around it: "the prescriptions of legal scholarship could not be articulated without a...vision of the entities to which the prescriptions are addressed" (198). Thus, legal discourse relies on understandings of context to formulate even precepts that it presents as acontextual.

John Donohue and Justin Wolfers' *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, meanwhile, illuminates the deep discomfort that this generally prescriptive orientation creates for uncertainty. This article re-examines evidence used to support the argument that the death penalty deters homicide and concludes that that the data neither sustain nor disprove that contention—a non-answer legal scholars are resistant to acknowledge. Mertz's own study of the law school classroom, *Teaching Lawyers the Language of Law*, suggests that some of these disciplinary divides originate in the crucible of legal training itself, where students are taught, by example, to leave contextual factors and moral values out of their discussions, and focus instead only on legal relevance.<sup>5</sup>

Bryant Garth is a bit more optimistic—or, at least, his *Observations on an Uncomfortable Relationship* sees the interaction of law and social science as necessary to law: a realistic vision of the world, he argues, is crucial to "legitimizing the law" (319). For this legitimation to happen, he suggests, lawyers need sometimes to go beyond the tactical prescriptions common in legal scholarship and practice and seek out broader understandings of the world the law works in. Wendy Espeland's *Legally Mediated Identity* and Jacqueline Urla's *Cultural Politics in an Age of Statistics* show how confrontations of government administrators and disempowered groups that come under their purview can profoundly influence both groups' understanding of culture, harm, commensurability, and selfhood. In both articles,

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<sup>5</sup> These insights are further elaborated in Mertz's (2007) book-length study.

bureaucratic categories and practices imposed unwelcome systems of quantification and assessment on marginalized communities. But they also provided those groups with new, unexpected tools for self-understanding, self-expression, and advocacy against the very bureaucratic systems that oppose them. Lawrence Rosen, in *The Anthropologist as Expert Witness*, is even more hopeful, suggesting that many of the problems of using social scientific evidence in trials could be avoided through procedural changes encouraging neutral and balanced presentations, and through greater involvement by professional associations in setting standards for members' participation in legal processes.

Most of the articles here address how legal discourse can, should, and doesn't take social science into account. David Nelken's *Can Law Learn from Social Science?* provides a valuable counterbalance, seeking to explain "why law may have only a limited concern for (social scientific) truth" (159) in the first place. For Nelken, social science sometimes views law in an overly simplistic way as a forum for the making of truth claims and the regulation of conduct, ignoring the many other roles law plays: ritual, literature, the expression of cultural values, an arena for conflicting narratives and normativities. If social science is to have any hope of being incorporated properly into law, he suggests, social scientists reciprocally need to take seriously the uneven, internally differentiated distribution of approaches toward truth and value among law's institutions. Similarly, Susan Silbey and Austin Sarat's *Critical Traditions in Law and Society Research* asks scholars to study themselves, proposing "a sociology of the sociology of law" (496). Both discourses, in other words, are limited in purview and effect; both are subject to change, including through mutual interaction; and both could use a dose more humility and self-awareness.

These contributions suggest that a narrow focus on legal discourse's ability to correctly understand and incorporate social science may be misplaced, or at least too partial. Perhaps we should assume that law will digest social science research in its own way—that context, too, will be changed upon the blue guitar of law. The essays in this book show that examining just *how* legal discourse creates and changes understandings of its context can reveal new aspects of both law and social science. It could also yield important insights for how to bring them into closer conversation—if not into commensuration.

The essays in these important volumes usefully illuminate fissures in the walls that law builds to set itself off, showing how non-legal knowledges and methodologies operate in the very core of legal discourse, influencing legal decisions and processes from the inside. And they provide tools and approaches to use in illuminating other such areas. At the same time, I worry that at least parts of these books take a bit for granted the internal structure, and specifically the unity, of law itself. After all, the nature of legal action depends crucially on distributions of authority, divisions of labor, tropes of legitimation, and traditions of practice among the diverse persons and institutions that make up the state: the expert discourse of law itself is highly internally variegated.

This may seem obvious. It *should* seem obvious. And yet the go-to image of the legal setting that permeates so much writing about the law is the courtroom, with its judges, litigators, and opinions. What effect, I wonder, does the unmarked nature of that image—which captures such a tiny portion of actual legal practice—have on how we formulate scholarship about the law, and how we imagine that scholarship interacting with legal discourse?

Different legal institutions act on different instigations; that structures the scope and style of their legal pronouncements. They collect information through different processes; that delimits the sources and substance of their evidence and influences how they use it. They are subject to discipline through different structures of oversight, in differently constructed hierarchies. And they are prone to different kinds of challenge, each with its own forms of argumentation, legitimation, and effects. These differences are not cosmetic. They structure what legal actors and institutions do and how they do it, which means they profoundly affect how other expert discourses work within the legal frame. Attending to this internal variegation—following contexts as they wend their way through the numerous institutions that produce law—is thus critical to understanding how non-legal discourses participate in legal practices.

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