

A Note To My Philosophical Friends About Expertise And Legal Systems

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ABSTRACT

This brief essay explores how understanding the treatment of expert evidence requires engaging with its legal and political contexts, and not just focusing on its epistemological aspects. Although the law of evidence and thus its treatment of experts is significantly informed by epistemological considerations, it is also informed by concerns over the organization of trials, larger issues of intelligent governance, social concerns, and enforcement issues. These five aspects to the law of evidence give rise to principles to guide the explicit structuring of the law of evidence that are identified here as well. This complexity helps to explain why the central issue of expert testimony is not the epistemological one of knowledge and belief but instead the conflict between educational and deferential modes of trial.

Keywords: testimony, expert testimony, reliability, epistemology, purposes of trials.

1. Introduction

The inclination of the philosophically minded seems to be to isolate and analyze the essence of the object, concept, thing, whatever, of interest. Sometimes that inclination should be resisted. The standard analysis of expertise and the legal system is a good example of this. The standard critique assumes or asserts that an important goal of the legal system is to admit or take advantage of scientific knowledge, and then descends into the seemingly endless (to the not-so-philosophically minded) wrangling over what is knowledge and how we can know that we possess it. Sometimes the

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intractability of these age-old and unresolved questions leads to justified belief as an alternative, or justified true belief as an amalgam of the two. Implicit in these efforts is the belief that the essence of expert testimony (and frankly testimony of any kind) can be identified and that its purpose is this or that. It is my belief, which I believe is both justified and true, that this background assumption is false. Indeed, it radically misconceives the object of inquiry as being “expert testimony” simpliciter and thus misses that expert testimony is embedded in a larger legal structure and implements whatever the objectives of that structure are.

“The objectives of that structure” are themselves immensely complex. The treatment of expert testimony is embedded in a theory of the trial, which itself is embedded in a theory of litigation, which itself is embedded in a theory of government, and often these theories are contested.¹ The relationship between trials and overall social welfare, as judged by a contested theory of government thus generates an incidence of the standard problem of the liberal state of how to structure things to assist people to muddle through in life in the face of disagreement about ultimate ends. The reduction of expert testimony to questions of justified belief or knowledge implicitly rests on a prior view that advancing accurate outcomes is the goal of a trial, but unfortunately it is not. It is one goal, and an important one (in my opinion the most important), but it is not the only goal. To be sure, overall social welfare is advanced by accurate decision-making because otherwise, generally speaking, rights are meaningless, but a litigation system is costly and the costs of accuracy may outweigh the benefits. A system can be monetarily costly and the transactions costs of litigation can outweigh the remedy in a particular case, but reducing the transaction costs may encourage more litigation and disrupt valuable forms of social interactions (I can just sue my neighbor rather than ask her to turn down the music).

The law of evidence in the various countries that I have studied is responsive to these kinds of concerns, and the rules governing expert testimony is no exception. In the liberal democracies, the pursuit of truth through knowledge is one but only one of the goals. And a good thing too. It is more than somewhat ironic to have the philosophically minded harangue about knowledge and truth when they have been telling us for centuries that they cannot agree on what “knowledge” is, nor when it obtains.

¹ For a good overview of the philosophical literature on expertise, see Selinger & Crease (2006).

To understand and to critique the role of experts in the legal system require that expert testimony be considered in the context of the complex social dynamic just alluded to. I do this in two different ways. First, I describe the five major problems that the law of evidence must accommodate, and then extract from them and from the implications of evidence reform movements worldwide eight principles that guide the fashioning of a sensible law of evidence, including provisions for expert testimony.² To be quite frank, the point is to show how the philosophical fascination with knowledge, while interesting, is a small part of the considerations at hand. I then briefly discuss the major conceptual issue that expert testimony does pose, which is captured by the distinction between trials as pedagogical rather than deferential events.

There are at least five sets of competing considerations to be reconciled by the law of evidence in the service of its social functions. Only one has to do with epistemology, although that is where I begin:

2. Epistemology and the law of evidence³

The connection between expert testimony and truth is part of the more general connection between facts and rights. Facts are prior to and determinative of rights. For example, ownership of clothes allows a person the “right” to possess, consume, control, and dispose of clothing, but what happens when ownership is challenged? A judge or jury will hear evidence about who bought, made, found, or were given the clothes in question. Whatever facts are found will determine who has the right. Rights and obligations are utterly dependent upon facts and are derivative of them. The significance of this point cannot be overstated. It inverts the normal way of thinking about liberal states—epistemology is prior to deontology rather than the other way around. In addition, tying rights and obligations to true states of the real world anchors them in things that can be known and are independent of whim and caprice and gives them solidity and stability so that they cannot be removed arbitrarily.

The conventional view, reflected in the standard discussion of expert testimony, is that the law of evidence largely resides here. However, the tasks

² As part of consulting with the governments of China and the United Republic of Tanzania on law reform over more than a decade, I have examined evidence reform efforts worldwide. See Allen et al. (2013 & 2014).

³ This part is heavily indebted to Allen (2015).

of the law of evidence go far beyond the epistemological problem and involve at least four other matters that complicate both the structure of the legal system and efforts to analyze it.

3. The Organizational Problem

The law of evidence regulates the interactions of the various participants in the legal system: trial judge, jurors, attorneys, parties, and witnesses (both lay and expert) and constructs the framework for a trial. It allocates both power and discretion to each of the actors. By determining how much discretion the trial judge has, the law of evidence affects how much control the parties have over the trial process. The law of evidence also structures the relationship between trial judges and appellate judges. Should there be trial *de novo* in the appellate court, or is appellate review limited to the resolution of legal errors? Are small civil cases different from large commercial cases in ways that justify different treatment? What is unique about criminal cases?

The law of evidence also regulates the relationships among branches of government. Consider the choice between a complicated set of rules that restrict the power of trial judges and a series of guidelines that trial judges are expected to administer fairly. One may think that the primary implication of this choice has to do again with the epistemological problem, but that would be mistaken. The higher the discretionary threshold gets, the more power is passed down the chain of command to trial level judges. Discretionary rules insulate trial judges from control by appellate judges, but they also insulate the judiciary from control of the legislature. Categorical rules maintain control over the evidentiary process in the governmental organ that issues the rules, whether that organ is appellate courts or legislatures. Categorical rules also can be the means of educating trial judges of the risks of certain kinds of evidence.

The Organizational Problem does not end there. Complex rules of any sort give strategic and tactical advantages to certain groups in society, in particular those with the resources to master and employ those rules. This includes the wealthy and repeat players in the legal system, whereas simpler rules largely benefit those with lesser financial means. Complex codes of evidence law also contribute to the instability of decision making by encouraging appeals, which increase the transaction costs of litigation. Increasing the transaction costs of

protecting a right decreases its value, which may have detrimental social consequences. In any event, the law of evidence must be fashioned with all of these variables in mind.

4. The Governance Problem

Notwithstanding the importance of accurate fact finding, the public has other demands in addition to sensible trials, and consequently accurate fact finding competes with other social values, in particular through the creation of incentives of various kinds. Moreover, completely accurate fact finding is impossible, and difficult questions of how to allocate errors and correct decisions must be addressed.

The value of factual accuracy must be weighed against other policies that a government may reasonably pursue. The list of such policies is long and culturally contingent. For example, the law of privileges may foster and protect numerous relationships, including spousal, legal, medical, spiritual, and governmental. Perhaps settlement of disputes is preferred to litigation, which leads to the exclusion of statements made during settlement talks. In the United States and more and more in the world at large, a body of exclusionary rules is premised on the perceived need to regulate police investigative activities.

The Governance Problem also involves the relationship between primary and litigation behavior. Primary behavior is everyday behavior of the population. Litigation behavior is activity directed toward formal resolution of disputes. Regulating primary behavior involves what a society thinks is right and wrong, with creating the conditions for efficient economic behavior, regulating social interactions and institutions, and so on. Facilitating such behavior is the typical objective of social organization generally, and the law specifically. Litigation behavior, by contrast, involves parties attempting to resolve disputes that have arisen over claims about inappropriate primary behavior or to rectify social disruptions that have occurred through alleged violations of substantive law. Most current analyses focus on either primary behavior or litigation behavior as though they were separate spheres of influence with internal logics of their own. This separation, while analytically useful in many contexts, misses or distorts the central regulatory problem.

Primary and litigation behavior are not hermetically sealed off from each other. For example, there may be some types of litigation where behavior (both primary and litigation) is optimized by a low or zero cost litigation process. However, there may be other types of litigation that are optimized by infinitely high costs—in other words, cases that should not be brought. Perhaps family disputes are an example of this latter category. Other cases may be somewhere in between in that behavior is optimized by the impositions of some costs. The tasks for the legal system include responding intelligently in the face of such complexity—which cases should be encouraged to be brought, and which should not, and the law of evidence is an important tool in implementing whatever decisions are reached.

5. The Social Problem

Trials may serve yet many other social purposes, such as symbolic and political purposes. Both institutions and individuals can make statements through the means of trials, and impart lessons of various kinds. Trials also can be the means of vindicating reputations and obstructing governmental overreaching. Obviously, the law of evidence can impact all such issues. Principles of fairness and equity may also influence the law of evidence, although the precise effect of this variable is often hard to sort out from more overtly utilitarian motivations. Some think that the limit on unfairly prejudicial evidence reflects not only the concern about accuracy but also the concern about humiliation, as is also the case with character evidence rules. The limits on prior behavior and propensity evidence reflect in part a belief that an individual should not be trapped in the past. The hearsay rule reflects the values of the right to confront witnesses against oneself.

6. The Enforcement Problem

There is a critical distinction between the law on the books and the law in action. It is one thing to write laws and rules; it is another to enforce them in the way anticipated by the drafter of those provisions. The drafter of an evidence code may think that allocating discretion to someone, whether trial judge or attorney, makes sense, but the drafter will have in mind an approach to exercising that discretion that might not be shared by those being regulated by

the rule. More generally, it is hard to enforce complex codes in social events such as trials. The event itself, the trial, is often fluid and unpredictable, and it would be impossible to have every decision made at trial second guessed by some other authority.

A number of these variables interact. Another social value at the interstices of these various problems is the requirement that a legal system be perceived as fair. This has too many components to address here, but among them are the ideas that a litigant has the right to be heard and that the decision-maker comes to the task with an open mind. That means in part that dogmatic “truth” is to be avoided and that cases settle things only in light of what was presented at trial. That resolves the dispute between the parties, but does not resolve “truth” of very much in a more general way. If the next litigant has more or different evidence of some proposition, the tribunal is to consider it to see whether it changes anything. For a long time, separate but equal was equal, and then it was not. For a long time, cigarette manufacturers violated no duties to the consuming public, and then they did. For a long time, silicon was found to cause anti-immune diseases, and then it no longer did. The mutability of “knowledge” is well known in the philosophy of science, of course. It is a defining feature of legal systems. Its major consequence is the embracing of procedural notions of fairness of the kind just mentioned—the right to be heard by a disinterested fact finder.

7. Eight Principles

How does all this work out in the actual structure of legal systems? I have been working for over a decade with the governments of Tanzania and China in the reform of their respective legal systems, including the law of evidence. (Allen, et al. 2013, 2014) Out of that work has come what I call the eight principles to guide the writing or reformation of the law of evidence. (Allen, 2014, pp. 47-48) Collectively they indicate the complexities that emerge from the “problems” noted above.

1. Evidence law should facilitate the accurate, efficient, and fair finding of facts pertinent to legal disputes. Generally, all relevant evidence (evidence that would influence a reasonable person’s inferential process) should be admissible. Otherwise relevant evidence should be excluded only if there is a

very good reason for doing so that outweighs, in the particular context, the value of accurate adjudication—or contributes to the probability of it.

2. The law of evidence does not determine the “facts” that may be found; the substantive law does. The law of evidence facilitates reliable investigation into those facts.

3. The evidentiary process should respect natural reasoning processes. It should not impose strained or artificial limits on testimony or the presentation of real evidence absent a compelling justification.

4. Evidence law exists to facilitate the rational resolutions of disputes and not as an end in itself, and should be so constructed and interpreted. Meticulous compliance with technical modes of proceeding that do not serve the ultimate ends of accurate, efficient, and fair fact-finding should not be demanded, whether emanating from evidence or procedural codes. Trials should be conducted as a rational search for truth, rather than games that require formalistic compliance with complex rules. Reversals on appeal should be limited to cases in which a significant violation of a right likely affected the outcome of the case.

5. Decisions at trial are always decisions under uncertainty, with mistakes being unavoidable in the long run. Evidence law should facilitate equal treatment of parties and the reduction of errors made at civil trials. Civil parties typically stand equal before the law and should not suffer discrimination due to their formal status (plaintiff, defendant, applicant, respondent, intervener, etc.). Deviations from that principle should be rare and justified (such as civil cases involving allegations of fraud). In criminal cases, the Government must prove each element of any charged offence beyond a reasonable doubt; affirmative defenses with differing burdens of persuasion are allowable in limited circumstances.

6. Evidence law should not discriminate among groups in society. For example, undue advantage should not be given to repeat participants in litigation. Its language should thus be as spare, nontechnical, and immediately comprehensible as the subject permits. Evidence law should always be administered to advance, rather than obstruct, the underlying purposes of a legal system.

7. To the extent possible, without significantly compromising any of the guidelines noted above, the law of evidence should respect the norms of the communities to which it applies.

8. There may be occasion to provide exceptions to any of the guiding principles noted above, but those exceptions should be rare, limited, clear, and justified. Examples may include privileges, as well as the structuring of incentives for other socially valuable purposes.

The point I am making here can be understood in another way. Most expert analyses, whether philosophical or legal, proceed as though the object of inquiry is like a closed deductive system. The legal system is not. It is organic, not static, just like society of which it is a part. So, no, the critical problem of expert testimony is not the philosophical problem of the conditions or existence of knowledge, or whether the system prefers or is satisfied with justified belief, or whatever. I have literally never seen a case decided on such a ground. The problem instead is how to manage all this complexity, and the basis of decision is invariably (although not always in these terms) the rather open-ended concept whether a rational human being could be influenced by the proffered testimony on a material proposition. This is more complicated than it appears.

The solution to this problem of taming complexity is essentially procedural—decision is by competent, disinterested individuals able to comprehend, process, and deliberate upon the evidence to reach a rational judgment as to what occurred—and thus as to the rights and obligations of the parties. The facts are to be found by the disinterested application of common sense by members of the community (whether judge or juror). After determining the most plausible account of what actually happened, (Allen, 1991; Pardo & Allen, 2008) liability is determined consistent with the formalities of substantive law.

All of this is accomplished by exploiting common sense and general experience. Everyone at trial—judges, jurors, witnesses—has enough in common so that effective communication, and more importantly comprehension, is possible. Fact finders come to trial with a vast storehouse of knowledge, beliefs, and modes of reasoning that are necessary to permit communication to occur simply and efficiently. Conventional beliefs about the nature of reality and the existence of causal relationships are just assumed to be held by all participants, and virtually never are the subject of evidence. Everyone is just assumed to engage in orderly reasoning, employing all the necessary forms—deductive, inductive, abductive, statistical—as necessary or appropriate. Given a common language, or translations if necessary, comprehension of witnesses is just assumed, as is the ability to perceive the

connection between the evidence and the trial. Everyone is assumed to know about the foibles of human testimony and the perverse effects of potential biases, and thus to be able to judge the credibility of the testimony. Less well known, everyone is expected to be able to fill in the evidentiary gaps at trial that result from many factors (including that individual witnesses always know more than they can express) by drawing inferences based on one's own experience. Indeed, one of the arguments for juries and multi-member courts is that the probability of all this being done well increases with the size of the body deciding a case, because each person added to the group brings a lifetime of experience and knowledge to judge the evidence.

To return to expert testimony, what if testimony can only be understood with knowledge or experience that the fact finder lacks so that the chances are virtually zero that the fact finder will understand what the spoken words are intended to convey or able to intelligently appraise the truth of what is spoken? This is the critical conceptual problem posed by expert testimony for legal systems, and there are only two possible solutions to it. Either the necessary background information must be provided or fact finders must defer to the judgment of others, not because of comprehension and agreement, but because the fact finder is simply delegating that decision to someone else. Virtually always when faced with this dilemma, the Anglo-American legal system, and most other liberal systems of which I am aware, has chosen to require that information be provided in a comprehensible fashion to the fact finder. If a witness speaks a foreign language, translations will be provided. When routine business practices or conventions matter, evidence is adduced on the topic so that the fact finder may judge what the actual routine practices or conventions are. Expert testimony at trial is often inconsistent with this normal conception of a trial. Experts often engage in years of specialized training, which can make it difficult to educate the fact finder about the relevant issues at trial. Although the controversies over expert testimony explicitly are typically about such things as knowledge, they in fact are controversies over supplanting the norm of education by deference when someone qualified as an expert speaks, and thus can only be resolved by addressing that issue.⁴

⁴ The education-deference distinction was first introduced into the literature in Ronald J. Allen & Joseph S. Miller, (1993) and Ronald J. Allen, (1994).

The obvious first question to ask is whether deference is ever an absolute necessity, whether there are any cases that cannot be accommodated within the traditional model. Do some cases present issues for decision that defy the ability of fact finders to understand them? Perhaps the answer to these questions is “no”. The deficits of juridical fact finders do not appear to be cognitive; they are informational. Judges and jurors lack knowledge about many things, like science and technology, but there is no reason that they could not adequately master the relevant fields. This does not mean that a fact finder would have to become an oncologist or radiologist, or whatever. The objective is not to understand any particular field in its entirety. Rather, the objective is to learn enough so that rational deliberation can occur. In this respect, multi-body decision makers—either juries or panels of judges—are again superior to single person decision makers. Not every member of a panel needs to understand deeply every issue. The question is whether the panel adequately understands. It would be astonishing if a legal case actually defied the cognitive capacities of a small group even randomly picked from society at large, let alone vetted as both judges and jurors are.

Obviously, there are examples of ideas and even fields of inquiry that may defy common understanding at present. Many ideas in physics seep only slowly into the general population, even the general population of scientists. Maybe it would be asking too much for a judicial fact finder to learn special relativity or quantum theory, but to my knowledge these theories are not pertinent to any litigation that has ever occurred. Admittedly, physics is not the only difficult subject matter to learn. Many individuals find higher mathematics difficult (which is probably why they find physics difficult). Examples of two areas of somewhat higher mathematics that are pertinent to modern trials are calculus and probability theory. Still, while some people do, others do not find mathematics at this level obscure—or more importantly would not find it impossible to learn sufficiently for intelligent decision. Here again is the value of a multi-body decision maker. What matters is not whether everyone understands but whether the body as a whole does or could learn what is needed for intelligent decision.

The real objection to educating the fact finder is not that it is impossible but that it would be costly. If statistics plays a role in the trial, it would have to be explained so that the fact finder can understand, which would require some considerable instruction. The same would be true of various areas of medicine, and so on. In some cases, this educational process would not be terribly

burdensome, but in others it would be difficult and require extensive instruction. So, yes, it would be costly, but I literally do not know of any cases actually litigated that would seem to defy this educational process.

If the aspiration of trials to rational decision-making is to be achieved, the parties must educate the fact finder in all instances. This would eliminate the legal problem of “expert” testimony, because the category would no longer exist. That may seem like solving a problem by definitional fiat, but it is not; the point cuts much more deeply than that. The lamentable consequence of conducting trials through deference is that mistakes will be made because fact finders choose to defer to a purported expert who is in fact not testifying reliably but instead is providing what is called in the United States junk science. Junk science and unreliable expertise exploit the informational vulnerability of the law, the necessary condition of which is the fact finder not understanding the basis of the expert’s testimony. Making all witnesses, including what are now called expert witnesses, explain their testimony will largely eliminate this problem because false propositions resist comprehensible explanations. I do not say make them impossible, but the presentation of unreliable evidence would be made considerably more difficult.

But I need to examine the other side of this epistemological coin. Perhaps I am wrong that the primary limitation of fact finders is informational rather than cognitive; perhaps there are cases that involve “knowledge” in a strict sense—whatever that is—that judges and jurors are not able to comprehend. If such knowledge exists and cannot be conveyed at trial, then it is pointless to hold trials involving it in any legal tradition that emphasizes decision by disinterested individuals who rationally process the evidence; that simply cannot occur with a deferential mode of presenting evidence. Quite the contrary, if there are forms of expertise that are pertinent to trials but cannot be explained at trial, the solution is to not try those cases. If expertise exists and can be identified with the certainty that we know that Ohio is a state in the United States of America, its lessons should be embraced and the case so decided. How to do so is a different question. The form of trial but not its substance can be preserved through procedures like judicial notice or peremptory motions (summary judgment, directed verdict); alternatively, disputes can be resolved definitely by the state through legislation or regulation.

By contrast, maintaining a form of trial that involves expertise that is not comprehensible to the fact finder is, literally, nonsensical (but, as we shall see,

perhaps defensible). In trials involving deference, both sides offer expert opinions to which fact finders can defer; these opinions are virtually always diametrically opposed, with one favoring one party and the other favoring the other. If there are not opposing opinions, there is not a triable dispute, and the side with the unassailable (or at least unassailed) expert wins. If there are competing experts, fact finders in a deferential process do not grapple with the facts but simply decide which expert's opinion to accept. But fact finders cannot defer intelligently without understanding the relevant fields. To know which expert to believe requires knowing the field adequately enough to appraise the opinion in light of the facts of the particular case. Without knowledge of the field of inquiry, the fact finder has no rational basis to defer to either expert. This point reverberates over the use of expertise at trial, and emphasizes how much the deferential form of expert testimony is a reproach to deep aspirations of liberal legal systems. The mere admission by the trial judge of competing expert opinions without requiring an explanation of the experts' views, including testimony on the underlying field of inquiry, ensures that decision will be arational if not irrational. If, by contrast fact finders can decide intelligently about which expert to believe, deference to the expert is not necessary. The fact finders could see for themselves the progression of the expert's thought leading from the specialized knowledge through the evidence of the case to the conclusion being offered.

The struggle between education and deference certainly characterizes the American experience with expert testimony. The famous *Daubert*, 509 U.S. 579 (1993), case is a good example. It requires the trial courts to act as gatekeepers to expert testimony, admonishing them to admit only testimony based on "scientific knowledge".⁵ As is well known, the Court did not get its philosophy of science quite right, and in any event did not show any comprehension, let alone effort to resolve, the deeper questions of "knowledge" lying behind the problem of scientific knowledge. Moreover, it structured a process that leads to the presentation of opposing opinions/inferences at trial, and left unaddressed the mystery how that could occur if each side's expert was in fact testifying on the basis of "knowledge". Last, while it was a step forward to require trial judges to engage with the underlying expertise, the Court did not require that the jury be presented with

⁵ The Court subsequently generalized this to other forms of specialized knowledge, the point remaining that what is offered must be determined to be reliable by the trial judge.

the same level of explanation. In short, the Court converted the admissibility question into an educational event but left the trial as a potentially deferential event.

The key to unraveling what the Court did comes from a recognition that “knowledge” in a philosophical sense is not the foundation of the evidentiary regime. First, it competes with all the other interests noted above. Second, the problem of testimony, lay and expert, is about reliability, but it is not about much of anything that maps onto the philosophical debates about belief, knowledge, or truth. Testimony can be reliable but false, which is a common occurrence at trial, and one anticipated in great detail by the evidentiary regime that regulates examination of witnesses, permits credibility to be explored, and allows diametrically opposed visions of reality to be presented through testimony. The question is not whether a witness is testifying on the basis of knowledge but instead whether the fact finder can intelligently assess the witness’s testimony and reach a reasonable judgment about what happened. There is a limit to be sure. A witness, expert or lay, may tell a coherent story that nonetheless no reasonable person could believe because it can be shown to violate too much of an informed view of the world (like a witness offered to testify about an event but is shown not to have been present; but if presence is contested, and a reasonable person could conclude that the witness was present, the fact finder gets to sort it all out). Generally, such cases will not proceed to verdicts. However, the cases that do proceed to verdicts cannot be demanding “knowledge” from experts because invariably their testimony will be opposed by another expert. Two experts cannot both be testifying from “knowledge” when they assert opposite conclusions. The typical, intensely practical, method of handling such scenarios avoids the deep philosophical questions by preempting them with a procedural solution that lets the parties do what they like to advance their interests, patrolled mainly by the requirement of a demonstration that a rational person could be influenced by an evidentiary proffer. If the parties want to roll the dice and not explain expertise to the jury (if there is one) that has passed the admissibility test, so be it. No one is required to do so; it is up to them.

The schizophrenic approach of the Supreme Court may appear to be problematic, with procedural fairness trumping knowledge and truth, but I think it reflects what I have been addressing in this essay, which is the complexity of the underlying dynamic of which expert testimony is a part. Requiring the trial judges to take some care in ensuring witnesses are testifying

on the basis of something reliable (which is really all that is meant by the Court's ramblings in *Daubert* about knowledge, science, and the scientific method) gestures in the direction of the epistemological problem of the legal system. Not requiring the parties to educate the jury in the same way as the trial judge gestures in the direction of party autonomy and fairness. It is up to the parties to choose whether to educate the fact finders or convince them to defer to an expert. They know their dispute and their resources better than anyone else and are in the best position to make choices that optimize their interests. So there is a form of deference occurring here but it is more to party presentation than to the specialized knowledge of experts.

At a more general level, decision in any particular case, even if it gets affirmed by the highest court with jurisdiction, does not establish any proposition in the case as true, except as between the parties themselves (in the sense that the end of the case ends that dispute). The parties to the next dispute are not bound by the prior decision and may litigate again any pertinent matters, including "scientific knowledge". If "knowledge" of most philosophical varieties were truly at stake at trial, leaving questions opened-ended would be a colossal waste of resources. Once things are known, they are known. Perhaps showing a more subtle understanding of the true nature of the problem than much philosophical discourse, or perhaps burned by making too many mistakes, liberal legal systems do not embrace this view. By leaving all questions open for reconsideration, the procedural context of litigation accommodates the lack of stability in "knowledge," expert or otherwise, that is such a philosophical irritant.

I am sure there are deep philosophical questions lurking in the description that I have given of the reality of litigation and its place in liberal legal systems, but they are not the standard fare of epistemology.⁶

⁶ Except, to a limited extent, "reliabilism". See the entry, Reliabilism, in the Stanford Encyclopedia of Philosophy for an overview, available at <http://plato.stanford.edu/entries/reliabilism/>.

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