**CONCEPTUAL CHALLENGE OF EXPERT TESTIMONY**

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Conceptual challenge of expert testimony. Ronald J. Allen Translated by Wang Zhuhao, Center of Cooperative Innovation for Judicial Civilization, China University of Political Science and Law & Jinlin University & Wuhan University, Beijing, PRC 100088.

【Abstract】 The relationship between expert knowledge and the trial pattern is examined. In general, trials are educational events in which the fact finder is expected to comprehend, process, and reflect on the evidence, and to reach rational conclusions as a result. This process reflects the fundamental importance of the accuracy of fact finding at trial, without which rights and obligations are essentially meaningless. Expert evidence often involves a deferential rather than an educational mode of proceeding and to that extent can be in opposition to the normal aspirations of trials. This article discusses the development process, forming reason and its consequences. The alternative is advanced that all evidence should be presented in an educational mode if the aspirations of trials are to be realized. If evidence cannot be presented in such a pattern, then the matter to which the evidence is pertinent plausibly cannot be litigated consistent with the normal aspirations of trials.

【Key Words】 expert testimony, factual accuracy, deferential mode, educational mode, aspirations of trials

It is a great pleasure each time I return to China to see my many students and how well they are doing. As I will discuss later in this paper, those of you studying evidence and procedure are critical to the continued progress of your country. My lecture tonight involves the conceptual challenge of expert testimony. This is important in its own right, because you cannot decide how to use expert testimony without understanding the difficulties that it poses, but that in turn means you must think about the nature of the legal system and how expert testimony advances or challenges the deepest aspirations you should hold for your legal system. The challenge will be to address all these issues in a systematic way, so let us begin.

The law of all countries of which I am aware contains relatively complex taxonomies of the types of information that conceivably may be pertinent to the resolution of a legal dispute. For example, American evidence law refers to scientific, technical and other specialized knowledge.[[2]](#footnote-2)1 The Federal Rules of Evidence, compounding the complexity, go on to specify various ways in which a person might become an expert, which involves the acquisition in any manner of “knowledge, skill, experience, training, or education” that may “assist the trier of fact to understand the evidence or determine a fact in issue.”[[3]](#footnote-3)2 If at least one of these criteria is met, an expert may express opinions or otherwise comment about the issues in a case, so long as the expert does so more or less consistently with the standards of the particular expert’s field of knowledge.

The suggestion in the Federal Rules of significant epistemological complexity because of the numerous forms of knowledge that might be pertinent to resolve a dispute is matched if not exceeded by complexity in practice. Enormous resources are spent analyzing and critiquing an apparently endless list of purported forms of expertise to determine the admissibility of testimony, to ensure that the expert is indeed going to testify on the basis of knowledge of some sort or another. If so, the expert is allowed to testify, but is not required actually to testify to that specialized knowledge. Instead, the expert may offer an opinion based on that knowledge about material propositions in the case.[[4]](#footnote-4)3 Unfortunately, opposing experts can do the same thing—and normally if there is not an opposing expert there is not a triable issue. Thus, after all the effort put into regulating expert testimony at trial, the trier of fact might find itself with two opposing opinions about what to do about matters that are beyond the knowledge of the typical fact finder.

The picture I painted above is odd in many respects. It suggests that there are critical differences between different forms of knowledge, that those differences can be accommodated for trial purposes by taking an internal perspective on the evidence being offered, and if that passes muster letting the expert opine about the relationship between the expert’s field and the issues being tried. This is odd because each of these propositions is high problematic, and collectively, while conventional, are quite counterproductive to the central purpose of trial. To justify that assertion requires that the central purpose of trial be identified, that the regrettable consequence of the conventional approach to expert testimony on that purpose be identified, and an alternative offered. I discuss these three points in turn below.

**THE FUNDAENTAL ASPIRATION OF LIBERAL LEGAL SYSTEMS**

There is controversy about the purposes of trial, especially in those jurisdictions with juries which may increase the possibility of a verdict against the law,[[5]](#footnote-5)4 but trials without reasonably accurate fact finding are pointless. They are worse than pointless; they are destructive of the foundations of liberal societies. The justifications of trials that neglect the significance of accurate fact finding are uniformly influenced by the misconception that the fundamental political insight of the Enlightenment, and thus the critical element upon which modern western governments rest, has something important to do with rights and obligations. Discussions of the political philosophers from Montesquieu to Rousseau are quite prevalent in legal scholarship. Trials bear upon this because they can be the vehicle by which various rights can be exercised, such as the right to be heard or to confront or resist. In countries with juries, an individual can defy government directly by appealing to the jury’s common sense and humanity.

**1. Obviously rights and obligations are important and necessary,**

but they are not sufficient. The more fundamental contribution of the Enlightenment to the legal system was the epistemological revolution that supplanted dogmatic knowledge with empirical knowledge. It replaced knowledge as the doctrines of the religious and political authorities with the concept that the world external to our mind may be known objectively through evidence.[[6]](#footnote-6)5 It is not an exaggeration to say that without accurate fact finding, rights and obligations are meaningless, and thus it is not an exaggeration to say that the most critical component of modern western civilization is accurate fact finding. Note that I say “modern western civilization.” I will discuss below the Chinese experience.

In fact, even the concept of jury nullification is literally meaningless without generally accurate fact finding; nullification is the exception to the rule of factually accurate verdicts.[[7]](#footnote-7)6 The point presses considerably more deeply. Examine any example of a right and it becomes immediately apparent that it is parasitic upon its epistemological foundation. Consider what was originally and still is one of the most fundamental rights in the West, the right to property. To make the exercise concrete, consider the simple case of ownership of your cellphones. Your ownership of a cellphone allows you the “right” to possess, consume, and dispose of those assets, but suppose I walk up to you and grab what you say is your cellphone and refuse to return it, claiming that it is mine. What will you do? You will go to someone with the power to adjudicate rights, to be sure, a judge or a jury, but what will you do next? Demand the return of your cellphone? No, of course not because I will respond that the phone is mine. You will present evidence about how you came into possession of that cellphone, by presenting a receipt or a bill from the phone company that associates you with that cellphone instead of me. Then you might turn it on and demonstrate all kinds of things that would convince a reasonable person that it is your cell phone rather than mine, such as text messages or emails addressed to you and none to me, and so on.

If successful in this effort to show the facts, the decision-maker will grant you the right to possess, consume, and dispose of the cellphone—return it to your possession, in other words—and that will impose upon me reciprocal obligations. But here is the absolutely critical point: the right to property is completely and utterly dependent upon the facts that are found and are derivative of them. This point cannot be overemphasized, and it inverts the conventional conception of the relationship of facts and rights. Facts determine rights and obligations. Whoever finds the facts determines the meaning and scope of a right, whether it is the right to property or the right to life.

A potential skeptical note—even if fact finding is important in the way I have described, isn’t it a rather large stretch to suggest that it is one of the most fundamental planks of modern liberal democracies? Not only is it not a stretch, but the success of the western democracies is intimately tied to this set of juridical arrangements. Tightly binding the rule of law to true states of the world anchors rights and obligations in things that can be known and are independent of whim and caprice. The right to the enjoyment of property does not depend upon the good graces of fallible human beings, or on their moods or prejudices. You do

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2. 1 Federal Rules of Evidence (FRE) 702. [↑](#footnote-ref-2)
3. 2 FRE 702. [↑](#footnote-ref-3)
4. 3 FRE 702, 703. [↑](#footnote-ref-4)
5. 4 See Robert P. Burns, A Theory of the Trial (1999). [↑](#footnote-ref-5)
6. 5 A good introduction is Enlightenment, Stanford Encyclopedia of Philosophy, available at <http://plato.stanford.edu/entries/enlightenment>. [↑](#footnote-ref-6)
7. 6 It also neglects that a jury that can acquit against the law can equally well convict against it.Thomas Andrew Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800 (1988). [↑](#footnote-ref-7)