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Commentary on Browne, Keeley & Hiers

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**COMMENTS ON M.NEIL BROWNE, TERRI J. KEELEY, WESLEY J. HIERS,
"THE RHETORICAL BURDEN OF EXPERT WITNESSES"**

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Under what conditions is it legitimate to accept some claim on the basis of authority—in particular, the authority of an expert?

Let the claim be p . A widespread textbook view is that for it to be legitimate to accept p on the basis of the authority of an expert, E , the following conditions must be satisfied: (1) p must belong to some body of knowledge, k ; (2) E must be an expert on k ; (3) E must not have a vested interest in p 's being true, or be otherwise suspect as a professed authority on whether p is true; and, finally, (4) the experts on k must agree about p . (Cf. Govier: 84.)

This last condition—call it the agreement condition—is of special relevance to the authors' concerns. We find the condition affirmed in textbooks, in various ways. For example, one textbook says that we assess the credibility of an expert's testimony partly by seeing whether or not the matter is controversial among experts. If the experts disagree about some claim, then we can't decide for or against that claim on the basis of what the experts say. (Pinto, Blair, Parr: 34-5). According to another textbook, it is legitimate to appeal to authorities speaking in their fields, "unless the issue is a controversial one in the field, one over which the experts disagree" (Freeman: 58). For an appeal to authority to be legitimate, there must be "general consensus" in the field in question concerning the claims endorsed (*ibid.*: 158).

This condition (the agreement condition) is, I believe, a standard textbook condition. It is rare, however, for textbooks to discuss the difficulties involved in applying the agreement condition. One of the interesting and valuable aspects of the authors' paper is the light it sheds on these difficulties, in its assessment of the Frye test. Even more interesting and valuable is the story the authors tell about how agreement is arrived at among experts in science, a story which raises the question of what epistemic significance should be attached to agreement among scientific experts.

The authors' paper is a long one (the copy I read is over 70 pages in length), but in my view it ends too soon. Much more needs to be said about the authors' dialogical model of courtroom expertise. The authors' case for this model is twofold. First, they argue that since experts are fallible, and since courts are constrained in their ability to determine the limits of the credibility of a particular expert, courts need to hear (at least) two contrary voices of expertise so as to sort out the usefulness of expertise. Second, the authors say that "[t]he resulting clash of expert opinion would force courts to face up to their responsibilities as critical thinkers."

Let us call these responsibilities the courts' epistemic responsibilities.

I have a number of questions.

Are there cases in which a court's hearing from just one expert would be sufficient? Would the authors say that

cases are possible *in principle* in which courts could discharge their epistemic responsibilities adequately though having heard from only a single expert, but that *in practice* such cases will be so unlikely that, for practical purposes, they can be discounted? Or would the authors wish to provide for such cases in practice?

Next, consider the authors' recommended approach to expert testimony—a courtroom dialogue between two experts.

We can distinguish two possible cases. In Case 1, the court finds itself unable to decide between the clashing opinions of the two experts. In Case 2, the court is persuaded that one of the experts is correct. This might happen even if the court lacks competence in the experts' field (as it assumedly will, or why the appeal to expertise?). For one thing, the court might judge that expert A succeeds in fending off expert B's challenge, or that in cross-examination expert B's testimony is undermined—and is undermined in such a way as to give credibility to expert A's testimony.

Consider Case 1—where the court is unable to decide between the two experts. What are the court's epistemic responsibilities in this case?

At a minimum, surely, not to accept, or reject, the claim that is in dispute—call it p . But then what should the court do? Seek further evidence by calling on further experts? If so, the outcome will either be a repetition of Case 1, or it will be Case 2 (or an approximation to Case 2).

Case 2 is where the court is persuaded that one of the experts is correct. What is the court's epistemic responsibility in this case? Is it to accept that expert's claim—say the claim that p is true? Here is an objection to the view that this is the court's epistemic responsibility:

For all the court yet knows, the expert's opinion may be a minority opinion in the expert's scientific community. Suppose that in that community the consensus viewpoint is that p is false. (As I use the term "consensus" here and below, a consensus viewpoint in a community is one that enjoys general, but not necessarily unanimous, acceptance in that community.) If the consensus viewpoint in the expert's scientific community is that p is false, then, the objection goes, there is a presumption in favour of the reasonableness of the court's *not* accepting p , but accepting not— p instead. And given the possibility that this is so, the court has the epistemic responsibility not to rest content with the testimony of the expert who endorses p , but to determine whether there is a consensus concerning p in the expert's scientific community.

An objection of this sort would presumably be made by the textbook adherents of what I earlier called the agreement condition. But if the objection is sound, we face the spectre of the Frye test.

(Actually, we face that spectre, or one like it, earlier—at the stage of setting up the dialogue between experts. For it must be determined whether there *is* disagreement among the experts on the matter in question. After all, if there is no such disagreement, then it won't be possible to arrange for a clash of expert opinion in the courtroom.)

Now, however, I want to consider a reply to the objection I have just presented a reply based on the story that the authors tell about what they call vademecum science, a story about how such science emerges. Some details from that story:

- scientific claims are subjected to a substantial amount of arbitrary treatment by other

scientists;

- the process of fact construction proceeds through networking;
- status inequalities affect the ability of scientists to engage in the struggle for claims-acceptance;
- the social characteristics of the scientists who make the claims play a role in the claims' evaluation;
- there is a tendency for famous scientists to be overrecognized and, as a result, for significant and valid research to be marginalized in a scientific community stratified on the basis of criteria other than merit;
- the scientific community is marked by sex discrimination, intellectual suppression and hegemony, obscurantism, homogenization of perspective, struggles for power and authority, and intradisciplinary conflicts over what constitutes the discipline in question.

The upshot? Consensus among experts isn't the product of rational deliberation yielding a patently correct position, but is imposed by elites and by those who conform to disciplinary conventions. This being so, the reply continues, consensus among scientific experts is suspect—worse, it is non-authoritative, so that there is no presumption in favour of the reasonableness of accepting a consensus viewpoint. Consequently, the reply concludes, in a case in which a scientist persuades a court of the truth of some claim, the court does *not* have the epistemic responsibility to determine whether that claim is a consensus view in the area of the scientific community to which the scientist belongs.

I am not sure whether Prof. Browne and his colleagues would endorse this reply to the objection, and this is because I am not sure whether they would draw the conclusion from their story about vademecum science that a consensus among scientific experts never creates a presumption in favour of the reasonableness of accepting a consensus viewpoint.

There are contrary indications. Thus, the authors make it clear that they do not wish to reject scientific knowledge, or, then, to embrace what they call epistemological nihilism. For them, the question is not whether there is such a thing as scientific knowledge (they allow that there is), but how scientific knowledge is to be interpreted. Further, in the final sentence of their paper they describe a consensus viewpoint as a negotiated process, reflecting power relationships as well as logic and data. Perhaps, then, their view is that a consensus viewpoint *may* reflect logic and data to a degree such that the viewpoint has the status of knowledge. This, I think, *may* be the authors' view. If it is, would they say that the likelihood of a consensus viewpoint's being knowledge is such that there is a presumption in favour of the reasonableness of accepting it? It is not clear to me that the authors' story about vademecum science *entitles* them to say this, even if they would wish to say it. But nor is it clear to me, on the other hand, that that story leads to epistemological nihilism.

I am left, then, with the question of what the epistemic significance of a consensus viewpoint in science is, in the opinion of the authors.

Let me hazard a guess as to the answer they might give. They might say that a consensus creates at best a weak presumption in favour of the reasonableness of accepting the consensus claim. This being so, they might go on to

say, a court has the epistemic responsibility not to accept a consensus claim uncritically, but to seek evidence as to how the consensus was negotiated. Was it in a process in which possibly valid views were marginalized, or was it in a process in which rational factors—logic and data—predominated?

But now we must ask how the courts are to discharge this epistemic responsibility. By listening to a dialogue between experts? If so, then the questions we asked earlier concerning a court's epistemic responsibilities in regard to such a dialogue seem destined to repeat themselves.

Some concluding points. The authors believe that their story about how vademecum science emerges has implications for determining a role for the scientific expert witness. In the final section of their paper, they say that the rhetorical burden that experts can fulfil, given the climate in which a scientific consensus is forged, is that of "the self-conscious rhetor". Is this, then, the role for the scientific expert witness—the role of self-conscious rhetor? I do not see how the authors' story about vademecum science has the consequence that it is. But this is partly because I do not know what the authors mean by a self-conscious rhetor. In the case of a scientific expert, is a self-conscious rhetor one who attempts to persuade an audience of the truth or falsity of some claim, but does so in full awareness of the nature of the climate in which her expertise has been constructed? Perhaps the authors will explain, and so assist us in the interpretation of the final section of their extremely interesting paper.

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