COMMENT

COMMENT ON BREWER: FORM AND CONTENT IN LEGAL PROOF (OR WHY EVERYBODY WINS—OR AT LEAST GETS A PARTICIPATION TROPHY)

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In 1980, I was in a Contracts class taught by the incomparable Arthur Leff. It became very clear very quickly that one student in that class was (apart from Professor Leff) the smartest and most interesting person in the room. That person was Scott Brewer. More than three and a half decades later, when I thought about who I would most like to invite to comment on my book *Evidence of the Law: Proving Legal Claims*, one name immediately shot into my mind: Scott Brewer. He was, as the saying goes, at the very top of my draft board. He was my Myles Garrett (though hopefully without any ankle injuries).[1]

I chose wisely. I am thrilled that Scott agreed to participate in a mini-symposium on my book held at Boston University School of Law on April 14, 2017. My goal in writing the book was to prompt really smart people to think and write about what I regard as really important and under-analyzed problems in legal epistemology. Scott is exactly the sort of person that I had in mind, with one small qualification: He was already one of the few people who was writing

[*] Philip S. Beck Professor, Boston University School of Law. In addition to my profound debt to Scott Brewer for his comments, I am grateful to Hugh Baxter, Rob Sloane, and Larry Solum for participating in the mini-symposium that generated this Comment; to Kris Collins for organizing that symposium; and to Jim Fleming for generating and maintaining the law school's tradition of celebrating books.

[1] When I first wrote this Comment on September 18, 2017, Myles Garrett, the first overall pick in the 2017 NFL draft (and the obvious consensus choice for that slot) had missed the first two games of the season with sore ankles. *See Sacked: Browns Rookie Garrett Out Weeks with Ankle Injury*, USA TODAY (Sept. 7, 2017), https://www.usatoday.com/story/sports/nfl/2017/09/07/browns-rookie-myles-garrett-out-for-weeks-with-ankle-injury/105349408/ [https://perma.cc/J8A8-LUE7]. Despite the Browns's miserable season, Garrett has been a beast since entering the lineup.

and thinking about those problems.[2] Accordingly, I was eager to see and hear what he had to say, and I am delighted to read his formal comments.[3]

Because my scholarly purpose in writing the book was to generate discussion, debate, commentary, and criticism, I could just declare victory at this point and go home. Mission accomplished. But since that might make me seem agonophobic, I will instead take the opportunity to make a very brief response to Scott's generous critique.

The critique has two elements: one internal and one external. The internal critique questions whether my five-faceted account of necessary conditions for proof—principles of admissibility, principles of significance, standards of proof, burdens of proof, and principles of evidentiary closure[4]—adequately serves its purpose of identifying questions that must, either explicitly or implicitly, be addressed by anyone who asserts any proposition. The external critique doubts whether those factors, even if internally complete and accurate, adequately explicate the nature of proof, because they do not really address the considerations that affect the strengths and weaknesses (or virtues and vices) of arguments. According to Scott, there is more to proof than is dreamt of in my philosophy.[5]

The internal critique has three parts, focusing on three of the five elements in my account of the necessary conditions for proof. First, Scott argues that I am wrong to refer to "principles" of admissibility, because the guiding norms for what I call admissibility are not necessarily structured enough to be called "principles." That is particularly true, he argues, if "anything goes" is an acceptable "principle" of admissibility, as that "principle" is really an anti-principle that renders the concept of admissibility effectively empty. Second, with respect to my claim that every act of proof at least implicitly presupposes some standard of proof that indicates how much evidence is necessary in order

[2] *See, e.g.*, Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996). I am not alone in recognizing that Scott is one of the few scholars doing fundamental work in legal epistemology. *See* Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 258 (2017).

[3] *See* Scott Brewer, *Agonophobia (Fear of Contest) in the Theory of Argument?: The Case of Gary Lawson's* Evidence of the Law, 97 B.U. L. REV. 2303 (2017).

[4] GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 9 (2017).

[5] So am I admitting that I have a philosophy? Okay, Scott has me cold when he says that I am really doing philosophy despite my protestations to the contrary. *See* Brewer, *supra* note 3, at 2304-06. I was a philosophy major in college, where I fell in love with epistemology. Graduate schools at that time, however, were sending out notices warning students who might be interested in graduate work in philosophy that there were no jobs in the field. Because my brother and sister had already sold our family's egg farm to put me through college (yes, really), I took the warning seriously and went to law school instead. Well, sort of. I went to Yale Law School, which really doesn't count. Then, to make it worse, I became an academic instead of a lawyer. But I have always been an armchair philosopher at heart. Scott has that right.

to validate a claim, Scott wonders whether the deep and wide disagreements among philosophers about what it takes to validate claims undermines the idea that there must be a standard of proof lurking beneath the surface: "When it is disagreement all the way down, the assertion that there is always a standard of proof in every domain of argumentative proof seems to require such attenuation as substantially to undermine the force of the claim itself."[6] Third, concerning the notion that all instances of proof presuppose some idea of evidentiary closure, Scott again wonders whether deep and persistent disagreement regarding just about everything makes the idea of "closure" in epistemology very dubious. I am going to stand my ground against the last two criticisms, but I think that I do have to give way a bit on the first.

I have a single response to the critiques of my analyses of standards of proof and evidentiary closure, which to some extent Scott anticipated:[7] I am not saying that, in any given context, there is a uniquely correct standard of proof or evidence set that all reasonable people must employ.[8] I am saying only that each individual claimant must, either explicitly or implicitly, be employing a standard of proof of some kind that lies behind their claims. Indeed, one of my goals is to bring these standards of proof into the forefront of legal epistemology (and, I suppose, epistemology more generally), so that people who disagree about things might have a better understanding of what they are disagreeing about. If disagreement in any given case is founded upon different ideas about standards of proof for certain claims, it would seem like a potentially useful thing to know. The same is true of evidentiary closure. I did not, and do not, mean to suggest that there must necessarily be an end to disagreement or discourse on any particular subject. I apply the idea of closure strictly to evidence sets, not to claims. My only argument is that all propositions are advanced in light of specific evidence sets, which necessarily include less than everything in the universe. Nothing in this idea requires acceptance of any particular evidence set as adequate in any given circumstance. Indeed, disagreement about the adequacy of evidence sets may be a fruitful source of disagreement about the truth of propositions—and, again, my goal is only to bring such disagreement out into the open where it can be analyzed and evaluated. I thus stand by my claim that any instance of purported proof, in any field and of any kind, must involve at least an implicit specification of a standard of proof and at least an implicit claim of the adequacy of an evidence set in a given context.

On the other hand, I think Scott has a good point about "principles" of admissibility. "Principles" is not a good word to describe what I really mean (and what I think can justifiably be claimed) about the nature of proof, so Scott has raised a sound terminological point. Notice that I did not attach the word

[6] Brewer, *supra* note 3, at 2310.

[7] *See id.* at 2309-10.

[8] I rather suspect that, over a large range of cases, there actually is such a uniquely correct set of epistemological norms, but I am not saying that, so do not quote me on it, as I have not said it.

"mere" to the word "terminological." I do not think that there is anything "mere" about terminological points. Indeed, much of my scholarly work has been designed to clarify what various terms mean and how they are used (and misused). Getting the terminology right is crucial to clear thinking. I doubt whether I got the terminology right, for exactly the reasons that Scott gives. To speak of "principles" of admissibility conveys more of a requirement of structure than my argument can bear. Frankly, I first used the term "principles of admissibility" about thirty years ago, long before I had thought very maturely about the issues that are addressed in my book, and I carried that term through three decades without serious reconsideration. Upon (hopefully mature) reconsideration, I now prefer other terminology. I would speak of "norms" of admissibility, but there is too much literature that uses the word "norms" in other senses to make the word convey what I hope to convey. My only point in the book is that every instance of purported proof relies upon some notion of what counts for and against a claim. That notion is what I mean by "admissibility," and perhaps "notion of admissibility" is the most neutral, and therefore least misleading, term that I can find. I do not mean to say that all such notions of admissibility must be principled, as ordinary readers would likely understand that term. I mean to say only that they must exist.

Nor, upon reflection, do I think that "anything goes" counts even as a notion of admissibility, and I regret using that term as well.[9] I am no expert on cognitive science, but it seems unlikely that it is possible to think without focusing on some subset of the myriad features of the universe, so that any act of cognition must, at least implicitly, operate based on some notion of what counts and what does not count. In other words, all cognition presupposes some idea of *relevance*. As James Bradley Thayer said in a narrow legal context, but which I think is applicable in all contexts: "There is a principle—not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence . . . which forbids receiving anything irrelevant, not logically probative."[10]

So amended, my claim is that any instance of purported proof must involve some notion of admissibility—of what counts for or against the asserted claim—and that such a notion must involve some idea of relevance that helps identify the subset of the universe that is worth investigating in any given context. Further the deponent saith not.

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[9] In all honesty, when using that term in my book, I was thinking of Cole Porter rather than Paul Feyerabend. *See* Brewer, *supra* note 3, at 2308. Indeed, I have never actually read Feyerabend's work. Based on how I have seen it described by others, I am pretty sure that I would not like it very much if I read it, so I don't think that I am happy about the prospect of being associated with it. But I would not want my own work to be evaluated by people who only read others' accounts of it, so I do not really want to judge Feyerabend's work without first engaging with it.

[10] JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264-65 (1898).

Scott's external criticism is that my account of proof is far too sparse. It ignores the varieties of arguments and pays insufficient heed to the virtues and vices of different arguments and argument types. As an alternative, he sketches the "Logocratic Method,"[11] which is "a method for assessing the strengths and weaknesses of arguments in any domain, including law."[12] Because Scott maintains that proof and argument are indissolubly connected, he wonders whether my account's thinness and its refusal to engage with what makes arguments more and less virtuous reflects an *agonophobia*, or fear of contest.[13]

My colleagues, who have heard me defend everything from libertarian anarchism to voting for President Trump, can verify that, while I can fairly be tagged with many labels, "agonophobic" is an unlikely one. Nonetheless, I do try to pick my battles. My account of proof is thin simply because I am not trying to give an account of proof. I am trying to identify certain preconditions for proof, but I make no claim that this identification covers everything that is important for an understanding of proof. To put it crudely but, I think, accurately: I am addressing certain formal requirements for the idea of proof but am saying nothing about what makes proof substantively effective, either epistemologically or rhetorically. I say nothing about "what constitutes *good* proof."[14]

Thus, I do not think that anything in my project competes with, or contests, Scott's project. To the contrary, I believe that the projects are complementary. Everything that I say can be right and everything that Scott says can be right. Scott is filling in the content of a theory of proof; I am just trying to identify a set of questions to which that content provides answers. His analysis is substantive; mine is purely formal.

If I ever sit down to determine what I think is a good way to fill in the content of the idea of proof, it is quite possible that I will end up as a Logocrat. Scott's approach has the considerable virtue of being Aristotelian in orientation, and Aristotle is my second-favorite philosopher of all time.[15] It all seems sensible to me, though I have never thought carefully about whether analogy and abduction are epistemologically reducible to induction and deduction or are possible sources of knowledge in their own rights. Since Scott has thought about that question and I have not, the chances of him being right are pretty good.[16] But to settle those matters would require far more dreaming about philosophy than I

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[11] Brewer, *supra* note 3, at 2311-17.

[12] *Big 'Thinks' Come in Small Packages: HLS Thinks Big*, HARV. L. TODAY (July 1, 2016), https://today.law.harvard.edu/big-thinks-come-small-packages-hls-thinks-big/ [https://perma.cc/7FAA-BVKT].

[13] Brewer, *supra* note 3, at 2317.

[14] *Id.*

[15] That is not a small achievement for Aristotle. By comparison, Rush is my second-favorite rock band of all time, and Rush is pretty spectacular. That is fine company for Aristotle.

[16] Is that reasoning an instance of induction, abduction, or both?

can presently indulge. I am, as the saying goes (and with a tip of the cowboy hat to my colleague Hugh Baxter), just a simple country lawyer.[17] If I can help turn the Scott Brewers of the world loose on basic questions of legal epistemology, I will be satisfied.

[17] *See Simple Country Lawyer*, ALL THE TROPES WIKI, http://allthetropes.wikia.com/wiki/Simple_Country_Lawyer [https://perma.cc/X84C-55NF] (last visited Nov. 17, 2017).