ALEX STEIN

ON THE EPISTEMIC AUTHORITY OF COURTS

ABSTRACT

This paper uses Carl Ginet's concept of "disinterested justification" to identify the boundaries of the epistemic authority of courts. It claims that courts exercise this authority only in the "interest-free" zone, in which their determinations of disputed facts' probabilities can be made and justified on epistemic grounds alone. This is not the case with the "interest-laden" domain, where courts allocate risks of error under conditions of uncertainty. This domain is controlled by the risk-allocating evidentiary rules: burdens of proof, corroboration, hearsay, opinion, character, and others. These rules are driven by moral and political, rather than epistemic, reasons. Their role is to allocate the risk of error among plaintiffs, defendants, and prosecution by setting forth probability thresholds for findings of fact and the criteria for adequacy of the evidence upon which those findings can be made.

This paper offers a preliminary exploration of the epistemic authority of courts. Part I claims that, in order to have epistemic authority, a factfinder must be both cognitively competent and be able to give a systemic and generally dependable assurance with respect to her accuracy and impartiality. Part II argues that Carl Ginet's concept of "disinterested justification" is crucial for understanding and satisfying this special-assurance requirement. Part III narrows the applicability of Ginet's concept of "disinterestedness." There, I argue that disinterested justification informs accounts of epistemic authority that feature justified *believers*, as opposed to beliefs. Part IV expands Ginet's concept to include in the definition of "interestedness" any factfinding decision that is not interest-free, rather than only those decisions that implicate the decision-maker's wanting to arrive at a particular outcome. Part V uses the emerging conceptual apparatus to identify the key features of the epistemic authority of courts and the law of evidence.

I

Epistemic authority and, in particular, the epistemic authority of courts implicates an account of a justified *believer*, as opposed to a justified belief. Epistemic authority has the same fundamental feature as a moral authority (Keren 2007). This feature is

 DOI: 10.3366/E1742360008000488

https://doi.org/10.3366/E1742360008000488 Published online by Cambridge University Press

the authority's production of peremptory (Raz 1985) or other deferential (Shapiro 2002, 408–10) reasons that command subordination to those who recognize the authority voluntarily or through a socially accepted coercive mechanism, such as law. These authoritative reasons replace the parallel reasons that the authority's subordinates might develop individually. If Peter claims that Diane failed to deliver on her contractual promise, but the factfinding authority – a court – decides that Diane actually did deliver what she took upon herself to deliver, this finding and its underlying reasons would override Peter's allegation and the reasons he set forth to support it.

This override originates from a *special assurance* about getting the facts right that only courts – as factfinding authorities – can provide. Peter, Diane, and other litigants cannot provide this assurance for and among themselves. These litigants may well be as cognitively competent as courts are. Based on empirical evidence, they can determine the probabilities of the relevant events more or less adequately (some of them may even have done so successfully in the past while acting as jurors in other people's trials) (Cohen 1983). Cognitive competence alone, however, only provides an assurance about the individual's *generally adequate* potential as a factfinder. The actual realization of that potential is a different matter, and the assurance we should be looking for here must relate to this realization. This assurance needs to accompany the factual findings over which people disagree. When Peter and Diane state their conflicting factual allegations, they provide no assurance about getting the facts right. Their self-interest precludes them from providing this assurance. Because of this self-interest, it would be highly unreasonable for us – as an organized society – to allow Peter's factual findings to override Diane's, or vice versa.

Boris, a private person who can function as a factfinder who is both neutral and cognitively competent, also cannot provide the assurance we are looking for. Unlike Peter and Diane, Boris has no personal interest in the adjudication of Peter's suit. He also credibly promises to diligently consider all the evidence upon which Peter and Diane base their allegations. But Boris is neither a judge nor an officially appointed juror. His impartiality and accuracy as a factfinder are features that can be present in some cases and absent in others. These features cannot be credited to any of Boris's systemic and generally dependable characteristics. The required systemic and generally dependable impartiality and accuracy is a feature that only social institutions can develop.[1] They can do so by adopting and enforcing special rules, protocols, and procedures. Ordinary people like Peter, Diane, and Boris can be both accurate and impartial factfinders, but not in a systemic and generally dependable way. An ordinary person cannot dependably bind herself by a set of self-imposed rules of accuracy and impartiality in factfinding matters. She might be able to do so once or twice, but not over time and for all cases. An institution, in contrast, can dependably bind itself by such rules.

Cognitive competence, therefore, is just one of epistemic authority's characteristics. Being cognitively competent is a necessary, but not a sufficient,

https://doi.org/10.3366/E1742360008000488 Published online by Cambridge University Press

condition for becoming an epistemic authority. To qualify as an epistemic authority, a person – more realistically, an institution – must not merely be competent as a factfinder; she ought to be a competent factfinder in a systemic and generally dependable way. Satisfaction of this foundational requirement would provide the special assurance we are looking for. My paper is a preliminary exploration of this special assurance.

II

Adjudication is an epistemic social practice – a practice of accepting and rejecting factual propositions that are tendered as "true" in courts of law. Adjudicators determine people's rights, duties and liabilities by relying upon facts which they evaluate as likely enough to be true. Those evaluations of truth-value are not hypocritical: when factfinders say that such and such facts are "more probable than not" or "beyond a reasonable doubt" they really mean it. This pursuit of the truth is what we, as an organized society, set for adjudicators as a goal.

The key feature that singles out courts as epistemic authorities is the *disinterestedness* of the reasons that justify their factual findings. The justificatory apparatus that courts use in making factual findings must not merely confirm the court's belief that its findings are sufficiently likely to be true. Each and every component of this apparatus must be disinterested in the following sense: the court is not allowed *to want* any particular outcome. More accurately, it is impermissible for a court (i.e., a judge or a jury) to use reasons that involve *wanting* a particular outcome in the final factfinding decision.

This idea of *disinterested justification* is not mine. It belongs to Carl Ginet and is set forth nicely in Chapter III of his book *Knowledge, Perception, and Memory* (1975). I adopt this idea with a number of modifications that Ginet will not necessarily accept. These modifications both narrow and broaden Ginet's concept of disinterestedness in a way that makes it different from what he originally designed. Under my account, disinterestedness is a useful concept only for identifying epistemic authority; its status as a necessary condition for justified beliefs is controversial. Also, disinterestedness means interest-free factfinding in general, not just a decision-maker who does not want to reach any particular decision. These adjustments produce a conceptual framework that I subsequently use to identify the principal characteristics of the epistemic authority of courts.

III

Consider again Peter's lawsuit against Diane. Can Peter have a justified belief in the truth of his allegations against Diane, given that he very much wants to win the case?

As a preliminary matter, the answer to this question depends on whether Peter's reasons for holding his allegations true are justified under the chosen epistemic

https://doi.org/10.3366/E1742360008000488 Published online by Cambridge University Press

criteria. If so, then, under Ginet's criteria, Peter's belief would be justified, but only tentatively so.

The next step in the inquiry would be to find out whether one of Peter's justificatory reasons is contaminated by his desire to win the case. If those reasons are completely free from that desire, they would qualify as disinterested. This would make Peter's belief justified completely.

But this part of Ginet's account seems problematic because Peter's belief can also be justified in spite of his self-seeking desire to establish the likely truth of that belief. This justification could be established by the independent epistemic strength of Peter's reasons. Substitute Peter with Boris, a person who doesn't care at all about the outcome of the case, and assume that Boris has exactly the same reasons and the same belief as Peter. If those reasons satisfy the chosen epistemic criteria, Boris's belief would be justified; and if so, Peter's belief would then be justified as well.

Peter will admit that the way in which he used those epistemically good reasons was improper. He will openly acknowledge that he shouldn't have mixed those reasons with his desire to arrive at the outcome that those reasons happened to support. But Peter will also plausibly claim that this error was harmless because he still used the right reasons to support his belief. Most importantly, because Peter decided to use those right reasons, he would have formed exactly the same belief under a hypothetical scenario in which he is as completely agnostic as Boris is as to what belief he will arrive at in the end. Of course, Peter chose those reasons because he wanted to win the case, not because those reasons are right. Moreover, he would have picked any reasons – good or bad – in order to satisfy his desire to win the suit against Diane. But all this only exhibits Peter's motive, which may be epistemically irrelevant.

This motive might be epistemically irrelevant because it only can establish that Peter is not being intellectually honest. This would mean that Peter does not classify as a justified *believer*, but he might still have a justified belief. After all, Peter accessed the right reasons and used them in a more of less proper way to support his belief.

For that reason, Ginet constructs another pillar to support his structure. Under Ginet's account, Peter's factual allegations – no matter how well reasoned and accurate they are – would always be lacking justification. They would be lacking justification because Peter is unable to *transmit* his assurance for being confident in the allegations he makes against Diane. Peter's assurance that his belief is disinterestedly justified is not transmittable to people who care about the belief's truthfulness.

The factfinder's ability to transmit her assurance to the relevant audience is a crucial component of my account as well. Before getting to this point, I need to ask a question – perhaps a critical one – about Ginet's account. Why is having the ability to transmit one's assurance crucial for one's having a justified belief, as opposed to one's being a justified believer?

https://doi.org/10.3366/E1742360008000488 Published online by Cambridge University Press

Take a person who has several justified beliefs, which he cannot communicate after being injured in an accident. This person does not lose his ability to maintain a justified belief. He is, however, unable to transmit his assurance to the audience. This handicap makes the person unable to externalize the epistemic benefits associated with his beliefs. The handicap, however, does not make the person's beliefs altogether worthless. Those beliefs may not be transmittable, but they may still help the person to do things that benefit society (a deaf doctor who single-handedly cures patients exemplifies this point convincingly enough).

Hence, if the reasons underlying Peter's beliefs are good independently of his motive, his situation would be similar to that of the incapacitated believer. What makes Peter different from the incapacitated believer is the factor that silences the transmission of *his* assurance to the audience. The incapacitated believer is muted by his anatomy, while Peter is silenced by social epistemology. The incapacitated believer cannot speak at all, while Peter cannot speak authoritatively. The incapacitated believer is unable to communicate the good reasons underlying his beliefs. Peter can communicate those reasons, but *cannot acquire for them a peremptory or other deference-inducing status*. He can separate his anti-epistemic motive from his reasons, but not from himself. Contrary to Ginet, therefore, disinterested justification does not appear essential for one's having a justified belief. Yet it is necessary for one's being a justified believer and having epistemic authority over other people.

IV

The ability to develop a disinterested justification for factual findings and transmit it to the relevant audience – litigants and society at large – is the pivotal characteristic of courts. This characteristic turns courts into epistemic authorities. In the paragraphs ahead, I offer an explanation to this fundamental characteristic. My explanation expands Ginet's concept of disinterestedness.

First, I note that, according to Ginet, being disinterested in the sense of not wanting a particular outcome requires more than just being impartial. To see why, appoint *me* to adjudicate the dispute between Peter and Diane. Peter and Diane are just names that I invented; and so, as far as I am concerned, either of them can win or lose the case. I don't care who wins this case and who loses it.

This indifference makes me impartial. Does it also make me disinterested? Not necessarily. As a matter of fact, I am *not* a disinterested factfinder because I happen to believe that costly adjudication of private disputes makes it imperative to intensify deterrence against breach of contract. For that reason, when breach and non-breach are both plausible but uncertain scenarios, I might adopt the breach scenario and allocate the burden of proof accordingly. This allocation of the proof burden would make my justification "interested," rather than "disinterested," in Ginet's sense. But I would still be impartial since my reasons for deciding the case the way I do involve no preference for Peter or Diane as a person.

https://doi.org/10.3366/E1742360008000488 Published online by Cambridge University Press

My account of epistemic "disinterestedness" requires that the factfinder's justificatory apparatus be insulated from policy reasons and other non-epistemic considerations that favor one outcome over another. Under my account, the factfinder would not qualify as disinterested even when she opposes the inclusion of those extraneous reasons but is compelled by the law to use them in deciding the case.

Consider once again the dispute between Peter and Diane and assume that we are factually uncertain as to what undertaking Diane actually made. The parties made a written agreement, but the agreement is vague. Assume also that Diane drafted that agreement. The factfinder consequently faces a choice. She can interpret the agreement against Diane's interest by applying the "contra proferentem" rule of the contract law. Alternatively, she can refuse to apply "contra proferentem" and decide that Peter failed to establish Diane's breach of contract by a preponderance of the evidence. Under both scenarios, the factfinder's decision is not affected by her desire to reach that decision. The factfinder does not want any of the available decisions more than she wants the other decision. But her decision must either incorporate or refuse to incorporate the "contra proferentem" rule, regardless of what she personally wants to achieve. The factfinder, in other words, must decide the case by allocating the risk of error in the final decision one way or another. Her allocation of that risk will depend on the interest that the law has adopted for that purpose. That means that the factfinder's decision cannot be interest-free.

Any interest that will be chosen by the factfinder is equivalent to a desire to arrive at a certain outcome. Whether the factfinder affirmatively endorses this desire or acts merely as an agent for the lawmaker or society at large makes no difference. The involvement of an interest in the factfinder's decision makes this decision *epistemically* unjustified. This decision, of course, may still be justified on grounds other than epistemic. These non-epistemic grounds may even be compelling. However, a factfinder that relies on those grounds is not acting as an epistemic authority (if she can still be considered a factfinder at all).

A decision that allocates the risk of error in factfinding can never be disinterested. As such, it can never be justified by a resort to the decision-maker's epistemic authority. Courts and other social institutions can exercise epistemic authority only over those matters that are interest-free. The "interest-free" criterion – which, once again, I borrow from Ginet with some modifications – determines the boundaries of the epistemic authority of courts.

V

The characteristics of the epistemic authority of courts are summarized in Table 1.

Adjudicative factfinding occupies two domains, tagged respectively as "knowledge" and "antiknowledge." "Knowledge" denotes interest-free factfinding, i.e., evaluation of evidence and inferences unaffected by preferences

https://doi.org/10.3366/E1742360008000488 Published online by Cambridge University Press

Table 1. Epistemic authority of courts

Domain Justification	Knowledge (cognitive competence)	Antiknowledge (moral skepticism)
interest-free	X REGIME: free proof	
interested		X REGIME: rules, structured discretion

of one type of error over another. In that domain, adjudicators make factual determinations on purely epistemic grounds. Because adjudicators are cognitively competent, they are given broad discretion in that area. Their factfinding decisions in the domain of knowledge are not controlled by legal rules (occasionally, though, factfinders are advised to apply flexible guidelines and standards). The domain's prevalent regime can thus be identified as "free proof." But the scope allowed for this purely epistemic factfinding is rather narrow because uncertainty of the relevant facts and the need to prefer false positives over false negatives, or vice versa, are present in every litigated case.

"Antiknowledge," in turn, denotes interest-laden factfinding – decisions that expressly or impliedly allocate the risk of error under conditions of uncertainty in a way preferred by society (or by courts). In that domain, adjudicators' decisions are driven by moral and political, rather than epistemic, reasons. Under conditions of uncertainty, when adjudicators have no epistemic reasons for resolving the factual controversy one way or another, they allocate the risk of error to the plaintiff, the defendant, or the prosecutor by deciding the issue against that party. Adjudicators always have reasons, good or bad, for allocating the risk in the chosen way. Those reasons are situated in the domain of antiknowledge not only because they are moral and political, rather then epistemic, in nature, but also because they have no acceptable truth-value. Those reasons have no acceptable truth-value because they are not facts that can be discovered or established by some uncontroversial or accepted method. Rather, they are preferences that reflect their holders' ideologies, which are always contestable. The prevalent societal attitude towards these ideologies is moral skepticism and distrust. None of these ideologies, therefore, is given a privileged status. Disagreements over them are settled in a formal way by democratic procedures that transform people's collective preferences into laws.

This separation between the epistemic and moral aspects of adjudicative factfinding provides what I believe to be the best explanation for the law of evidence. This explanation maintains that moral principles allocating the risk of error pick up what the epistemology (of the interest-free factfinding) leaves off. This explanation also holds that the interest-free zone in which factfinders exercise

https://doi.org/10.3366/E1742360008000488 Published online by Cambridge University Press

discretion ("knowledge") is demarcated by the risk-allocating rules that determine evidential adequacy and standards of proof (Stein 2005, 105–40).

Adjudicators make their decisions under uncertainty by determining the probabilities of the relevant facts. They juxtapose these probabilities against the standards of proof set by the law. Those standards prescribe that a plaintiff be allowed to win the suit if her allegations against the defendant are more probable than not. They also prescribe that factfinders find the defendant guilty when the prosecution's allegations are proven beyond a reasonable doubt. The proof standards also require defendants, both civil and criminal, to establish the facts underlying certain defenses (labeled "affirmative") as more probable than not. For some special allegations, the controlling proof standard is "clear and convincing evidence." All those standards are rules of decision that allocate the risk of error in a way prescribed by the law. They demand that factfinders allocate this risk in accordance with society's interest in risk-allocation. The controlling status and, indeed, the mere presence, of this interest in factfinders' decisions mark those decisions as "interested" rather than interest-free. Legislation and court precedents that formulate the proof standards therefore are not epistemically driven rules. These rules are situated in the domain of antiknowledge, governed exclusively by moral and political principles. Factfinders must apply those rules and have no discretion to disobey them.

The same is true about the rules that determine the adequacy of the evidential base upon which factfinders determine the probabilities of disputed allegations. These rules render inadmissible hearsay evidence, evidence of opinion, controversial expert testimony, and character evidence (subject to exceptions). They also require corroboration for certain evidence or, alternatively, allow factfinders to decide cases based on a testimony of a single witness. Those rules allocate the risk of error on grounds that are moral and political, rather than epistemic. They allocate this risk by determining, under uncertainty, which evidence is and is not adequate for determining the probabilities of disputed allegations. They also identify the bearer of the risk: the proponent or, alternatively, the opponent of the evidence in question. These rules, therefore, are interest-driven as well. As such, they belong to the domain of antiknowledge, as opposed to knowledge. Factfinders consequently must apply these rules and generally have no discretion to disobey them.[2]

REFERENCES

Cohen, L. Jonathan. 1983. "Freedom of Proof." *A.R.S.P. Archiv für Rechts und Sozialphilosophie* 16: 1–21.

Ginet, Carl. 1975. *Knowledge, Perception, and Memory*. Dordrecht: D. Reidel.

Keren, Arnon. 2007. "Epistemic Authority, Testimony and the Transmission of Knowledge." *Episteme: A Journal of Social Epistemology* 4(3): 368–81.

Raz, Joseph. 1985. "Authority and Justification." *Philosophy & Public Affairs* 14: 3–29.

https://doi.org/10.3366/E1742360008000488 Published online by Cambridge University Press

Shapiro, Scott J. 2002. "Authority." In J. Coleman & S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, pp. 382–439. Oxford: Oxford University Press.
Stein, Alex. 2005. *Foundations of Evidence Law*. Oxford: Oxford University Press.

NOTES

1 Peter and Diane, consequently, are free to appoint Boris as a private arbitrator for their dispute. This appointment would certify Boris as an ad hoc epistemic authority for Peter and Diane. However, absent such an appointment or a societal designation as a judge or a juror, Boris's assurance that he can do the factfinding for Peter and Diane cannot turn him into an epistemic authority.

2 Comments and suggestions received from Alvin Goldman, Jennifer Mnookin, and Dale Nance are gratefully acknowledged.

Alex Stein is a Professor of Law at Cardozo Law School and George W. Crawford Visiting Professor of Law at Yale Law School. He specializes in evidence and, more broadly, in the mechanisms for handling factual uncertainties in adjudication. He authored *Foundations of Evidence Law* (Oxford University Press, 2005) and many other publications. He maintains a website at www.professoralexstein.com.

https://doi.org/10.3366/E1742360008000488 Published online by Cambridge University Press