# Authority, Legitimacy and Epistemic Accounts of Democratic Law:

## Estlund vs. Habermas

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ABSTRACT: David Estlund has recently articulated the most sophisticated form of epistemic proceduralism available in Anglophone legal and political philosophy, one that grants that there are normative political truths and that some possess superior knowledge of them but defeats the claim that superior knowledge can successfully confer legislative authority. In the course of his argument, he charges Habermas' rival version of proceduralism with 'political nihilism'. The first two sections of this paper show that this charge is false and based upon a misunderstanding of Habermas and that it obscures the fact that Habermas provides a potentially stronger form of epistemic proceduralism that defeats the claim that those who know should rule by undermining the very idea that there could be some who possess superior normative political knowledge. The third section discusses a weak point in Habermas' justification of coercive democratic law that is revealed in the course of the defense and suggests a Kantian way of remedying it.

# Epistemic Accounts of Democratic Authority and Legitimacy: Estlund vs. Habermas<sup>1</sup>

Epistemic views of democracy defend its legitimacy, or stronger, its authority in light of the epistemic virtues that the democratic process displays with respect to tracking some normative standard such as justice or the common good, however those are understood. They involve the belief that the truth about such matters, and in particular a sufficiently strong and effective tendency to pursue and discover it, is a necessary part of the justification of political authority and the legitimacy of the norms issued by such authority. This raises the question whether some other way of organizing political power and authority might do better on this score than democracy. If the truth about justice or the common good is the appropriate normative standard to use when justifying political authority or assessing the legitimacy of its exercise, why not connect these things more directly by giving authority to those who know such truths better? Why not let the knowers, or in more classical terms, the wise rule? The rule of the wise, or those who know (better), would be epistocracy. By

and hence unfortunately does not undertake the kind of examination I do here, despite acknowledging other respects in which the views are quite close.<sup>2</sup> Second, the discourse theory uses a different, more radical strategy to undermine epistocracy than epistemic proceduralism and this alternative path may offer other advantages. However it also turns out that if this path is taken, the issues of authority and legitimacy cannot be separated as they are in epistemic proceduralism and many other current approaches. Indeed, following Kant, the order of explanation between these two things turns out to be just the reverse of the usual treatment, and the implications of this are worth exploring.

### 1. The Charge of Political Nihilism

So what exactly is political nihilism and what is Estlund's evidence for accusing Habermas(ians) of it? Political nihilism is defined as the view that "there are no appropriate

discourse. Any imposition (in theory or practice) of substantive political standards would preempt the ultimately dialogical basis upon which Habermas thinks political normativity must rest. There is an echo of Arendt here: politics is the site of discursive contestation, so politics cannot begin with conclusions.

Here is where the price of the nihilist view is evidently too high to pay, or so I

human law and divine law.<sup>8</sup> Even for Locke, the natural law (or at least its legal force) was rooted in the will of a divine lawgiver, while for Kant it was still (arguably) rooted in a 'higher' moral law, and so on.<sup>9</sup>

In all these cases, a normative order that was not merely metaphorically conceptualized as a legal one was both hierarchically superior and such that systems of positive law should in a certain sense imitate, embody or reflect it.<sup>10</sup> This idea, and the intuition behind it, is being rejected by Habermas, not the idea that political decisions can be criticized using non-political and non-procedural standards. In fact, this ought to have been clear from what is said just three sentences prior to the passage Estlund (partly) quotes. Habermas notes there that nevertheless "this intuition is not entirely false, for a legal order can be legitimate only if it does not contradict basic moral principles".<sup>11</sup> Since this claim

legitimation that require a thick prior consensus on the values of a shared way of life or collective identity and a "transcendent" authority residing, or coming from, somewhere

conditions that it has an 'intrinsically rational character'. <sup>18</sup> It is perhaps more important, as we will see, to keep in mind that these presuppositions operate *wherever* attempts are made to support, justify or criticize a claim by means of reasons. Hence there is nothing special about "political normativity" in this respect, as Estlund might be taken to suggest above. In Habermas' view, *all* normativity rests on an "ultimately dialogical basis", and science, morality and art criticism are just as much "sites of discursive contestation" as politics is.

It is possible that such a serious misunderstanding could have arisen otherwise than by lack of sufficient attention to an admittedly demanding text. In particular, I think Habermas' own very liberal use of "procedure" might encourage the kind of reading Estlund gives. How this term is understood greatly affects whether or not it is right to say that Habermas does not allow any procedure-independent standards to play a role in evaluating procedural outcomes and whether this is an objectionable aspect of his political theory. In addition, there are at least two different ways of using "standard" whose differences have similar implications.

First, let's take a look at Habermas' uses of "procedure". Then we'll see whether he fails to allow for any "procedure-independent" normative standards for evaluation of political outcomes. For our purposes it will help to distinguish three uses (though there are others). Habermas sometimes uses a very general sense of "procedure" in which the major streams of post-Hegelian, post-grand-

In a more specific way, *moral* argumentation can be called a "procedure" insofar as it involves the operationalization of a particular rule of argumentation for the rational resolution of moral conflicts, namely, (U) or the principle of universalization.<sup>21</sup> However, the use of this rule in moral discourses should not be understood to function as a decision procedure in the strict sense. Either a rationally motivated agreement emerges that a candidate norm satisfies (U) or it doesn't. If not, the issue remains open or unsettled. Lastly in a more familiar way, a *political* process of legislation involving, say, a structured debate followed by a majority vote is also clearly a procedure. This time there *is* a clear mechanism for *deciding* an issue, say, whether abortion will be legal (a slim majority votes yes), even if it has not been *settled* by the achievement of a rationally motivated agreement (fierce public debate still rages).<sup>22</sup>

Given these distinctions, we can see that, in addition to the exegetical reasons given

Habermas's theory. He seems to view them as external standards for an *ex post* evaluation of outcomes such that "destruction of the relevant liberties would be illegitimate even if it had been decided by the proper procedure" (88). If we understand the relation between 'basic liberties' and the legitimating power of the democratic procedure in terms of the abstract *categories* of rights involved in Habermas's argument for the co-originality of basic rights and popular sovereignty, then Estlund's description of the situation here is simply incoherent. For in this case, if the basic rights that secure the communicative enabling conditions of politically legitimate legislation and state coercion are 'destroyed', then the relevant procedure simply did not exist. This 'outcome' is not illegitimate *ex post*.<sup>27</sup> It is *ex ante* illegitimate. In view of the destruction of the procedure-enabling conditions, there simply *was nothing that could count as a legitimating procedured* 

available here. First, *any* currently accepted moral standards can be used to criticize the outcome of a political procedure. Second, prior political decisions or outcomes – i.e., existing legal or political norms – can be used to criticize a current (or even a looming) one. For instance, various states in the U.S.A. are currently suing ('criticizing') the federal government over the recent health care reform bill by using (rightly or wrongly) a pre-existing constitutional norm. Thus it should be clear that at the level of political justification there is

how one can provide reasons to reject the knowledge tenet *without* undermining the truth tenet and thereby falling into a dreaded political nihilism. Since the purpose of this paper is also comparative and exploratory, I will develop the outlines of a Habermasian view by means of an exposition of Estlund's favored strategy that reveals several possible points at which the Habermasian strategy might have certain advantages.

Here, in brief, is Estlund's argument to establish the normative or moral superiority of democracy to epistocracy. He defines democracy as "citizens collectively authorizing laws by voting for them, and/or for officeholders who make them" (DA 65). While in this quotation and many other places he only mentions voting, he does make clear at certain points that his argument for the epistemic virtues of democracy depends upon there being a prior period of deliberation among citizens who are each focused on the normative truth of the matter at issue before a decision is arrived at by voting.<sup>31</sup> Next, he introduces the core idea of epistemic proceduralism, namely, "procedural impartiality among individuals' opinions, but with a tendency to be correct", or in other words, "the impartial application of intelligence to the moral question at hand" (DA 107). He also relates this thought to deliberative democracy, which he understands as involving the view that "political authority depends on a healthy application of practical intelligence in reasonably egalitarian public deliberation" (87). The basic thesis is then that "from a normative (or moral) point of view, democracy is the best epistemic strategy of governance among those that are generally acceptable (though it is not necessarily better than every alternative) eho 0.2 (ra) 0.2 (t) 0.2 827)

The second requirement is quite a bit more complicated. This is at least in part because Estlund grants the knowledge tenet, according to which there are a (relatively) few persons who have superior knowledge about the political normative standards (justice, common good, etc.). Since we are aiming to establish the authority of democracy from an epistemic point of view, this fact strongly suggests the challenge, "Why not let those who are admittedly in an epistemically superior position rule, if getting the political truth right is the point after all?" Here Estlund makes use of a familiar liberal thought to rule out epistocracy. In order for a form of political authority to be legitimate, it must be acceptable to the reason of those who are subject to it. It must be possible for them to understand and endorse the reasons why it can legitimately (permissibly) enforce its commands or law with coercive means. The particular form this constraint takes in Estlund's argument is that of a *qualified* general acceptability requirement according to which no political procedure may legitimately

With the qualified acceptability requirement in hand, Estlund holds that epistocracy is defeated by the reasonable rejectability of the most powerful and plausible attempt to defend the authority tenet of epistocracy, namely Mill's proposal that the educated should have a greater share in c

authority.<sup>04</sup> He first asks us to imagine a society, Prejuria, in which there is no established judicial system but everyone agrees on rules forbidding certain behaviors and on the

legitimacy argument. And t

abundant examples of claims which only achieved recognition as 'qualified' or 'reasonable' views through active social struggle and contestation. For instance, one writer of the then leading literary journal, *The Edinburgh Review*, responded to Wollstonecraft's arguments in favor of female suffrage by saying that soon people would be demanding that their dogs get the right to vote. (The writer was a man, of course.) Naturally this claim is not best read as a counterargument. Rather it expresses a judgment that Wollstonecraft's view is disqualified or unreasonable and not worthy of serious rebuttal. When such views are deeply entrenched among socially dominant groups it can take a long time and much social struggle to unseat them. This fact is explicitly built into the discourse-theoretical view of the democratic process and indeed of the evolution of the constitutional state. Hence the discourse theory treats the qualification question in a reflexive way by building it into its account of politics.

### III. The Discourse Theory and the Challenge of Epistocracy

As I have already suggested, the Habermasian account levels its sights at the knowledge tenet, according to which some (relatively few) know the normative standards of politics better than others. It thereby directly undermines epistocracy by denying the existence of 'experts' in political morality. Yet as we have seen Estlund thinks it is very hard to deny the knowledge tenet, so it is worth trying to shed some doubt on its plausibility before going on.<sup>17</sup> He even claims at one point that "it is certain there are subsets of citizens that are wiser than the group as a whole" (DA 41), where their 'wisdom' pertains to specifically normative claims about what a polity ought to do, i.e., what kinds of laws and policies are just or right. This may sound obvious in the face of disagreement about laws and policies, since if any group's views are the right ones, then all those with whom they disagree are wrong, and

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those who are right are presumably wiser than those who are wrong. But let me say something to weaken the plausibility of this claim.

Note first that we are supposed to believe that, without regard to any specific issue or subject matter, there are subsets of citizens who are wiser than the group as a whole. This sounds true in the abstract. That is, if we consider, say, nuclear physics, then obviously the subset of citizens comprising all citizens who are nuclear physicists is "wiser" on this issue than the citizenry as a whole. But here a question arises. Is the cognitive division of labor of the group constitutive of the wisdom of the group-as-a-whole or is it rather that, for the purposes of assessing the collective wisdom of the group, we simply as it were sum up the knowledge of each separate adult in the group? If the members of the group acknowledge the legitimacy of a cognitive division of labor, then it might well be the case that the "wisdom" of the nuclear physicists is the wisdom of the group as a whole with respect to the subject of nuclear physics. In this case, if you ask each separate individual member of the group to give you all of his or her wisdom regarding nuclear physics, each individual who is not a nuclear physicist will say something like, "Not my area: ask the nuclear physicists", and each individual who is a nuclear physicist will offer up whatever wisdom they have about nuclear physics. If the group is that kind of a group - and aren't existing societies more or less precisely this kind of group? – then it would be at least misleading, and perhaps outright false, to say that there are subsets of citizens that are wiser than the group as a whole, since the wisdom of the group as a whole (at least on the issues for which they have developed a division of cognitive labor) will simply be the wisdom of the subset that specializes on that issue. But the implausibility of the knowledge tenet on this construal of the wisdom of groups should be obvious. Who exactly is supposed to be the proper subset of the citizenry that comprises the "normative" or "moral" or "political morality" experts? Here Estlund's arguments concerning the failure of the epistocracy of the educated to be generally acceptable seem roughly as applicable as they were in the context of the argument against the authority

expressions and achievements". <sup>11</sup> In addition, the locution "emerges" suggests that democratic authority is, in an important sense, an emergent property, and this hints at a difference between Estlund and Habermas in the way authority is seen. <sup>12</sup>

expressed in the language of duties and rights, i.e., a duty not to kill and a right not to be killed. One can ask where such a norm gets its 'authority', i.e., its binding or 'requiring' nature. As analyzed by P.F. Strawson, the existence of reactive attitudes such as resentment and indigation testifies to the deeply embedded presumption that certain expectations concerning human interaction are not simply like expectations about how physical objects will behave, but rather embody norms held to be valid precisely in the sense of being authoritative or requiring that we act or not act in certain ways.<sup>48</sup> Hence their violation requires a justification rather than a causal explanation. The same point reveals that such norms pervasively structure social life and human interaction, since the reactive attitudes can clearly be activated in any kind of social context. It also suggests that these attitudes and norms are part of a web of relations of intersubjective recognition in which, as Strawson shows, actors mutually acknowledge each other as accountable, responsible persons that demand a basic form of respect. This in turn implies that cases of conflict, or an 'upset' of the balance of relations of recognition between actors, can arise that do not necessarily stem from the violation of a prior mutually accepted norm, but rather center on whether an existing (or proposed) norm is one that should be (deserves to be) seen as authoritative (valid, right, worthy of recognition).49

Conflicts in the domain of norm-guided interactions can be traced directly to some disruption of a normative consensus. Repairing a disrupted consensus can mean one of two things: restoring intersubjective recognition of a validity claim [i.e., a norm] after it has become controversial or assuring intersubjective recognition for a new validity claim that is a substitute for the old one. A greement of this kind expresses a common will. ... What is needed is a "real" process of argumentation in which the individ 0 0Tm /F350.24.2 (de) 0( 0.2 (c) 0.2 .2 (s.4 (s) -0.2 (i) 0.2 (m) 0.2(pl) 0.2 (y) .8 221.8p0 (

This ultimately means that if the disturbed relationships of recognition are to be repaired or the question concerning the authority (validity) of a norm is to be resolved, the actors concerned must arrive at a solution they all jointly affirm for what they take to be good reasons, where "good reasons" is just a placeholder for whatever participants themselves, in an appropriately structured process of argumentation, find convincing.<sup>51</sup> A norm that meets this test has earned the title of being valid or having authority. Since it is effectively moral norms that are in question in the justification of democratic authority, they are the only ones being considered here for the moment. Remember that even the 'original' authority of a jury system or of democracy in Estlund's argument was based on a presupposed background of moral standards and values. Insofar as rational moral discourse turns out to be the basis of that power to require or forbid action that valid moral norms have, i.e., of their authority, moral discourse is more original than the 'original' authority of Estlund's jury/democracy analogy. In sum, the only original authority that Habermas could ultimately recognize is that which is intrinsic to the communicative rationality of discursive justification. Paradoxically, this root of political authority thus resides in what he elsewhere describes as the 'anarchy' of communicative freedom.<sup>52</sup> If the discourse theory provides an adequate explication of this even more original authority, it would demonstrate yet another possible advantage over

<sup>&</sup>lt;sup>51</sup> This is reflected in the 'formalism' of the (U) principle that Habermas offers. To recall, it reads, "A norm is valid [morally right] when the foreseeable consequences and side-effects of its general observance for the interests and value-orientations of *each individual* could be *jointly* accepted by *all* concerned without coercion" (see fn. 21 for source). This principle provides no real guidance concerning which reasons are good reasons. To

belief or norm we have, but we cannot question all our beliefs or all our norms at once.<sup>58</sup> Two things follow from this. First, the outcome of any instance of moral argumentation can be criticized from the standpoint of any other currently accepted moral norm. Second, one need not envision each currently accepted norm

readings in his texts.3.

with the epistemic proceduralist it seems better to follow a strategy like that which Lafont suggests and present discourse ethics as offering a purely procedural notion of rational acceptability, but a non-procedural or 'procedure-independent' notion of moral rightness (as that which is equally good for all or equally in the interest of all).<sup>33</sup> In other words, even ideal moral discourse is an imperfect epistemic procedure that only offers strong support for believing that norms surviving argumentation are right.<sup>34</sup> But it is one for which we have no functional equivalents, hence it is the best kind of epistemic support we can ever get.<sup>35</sup> There is no threat of procedural nihilism at the moral level.<sup>36</sup>

At this point, the epistemic proceduralist may say, "Now, hold on. If you've made anything plausible by this point, it's only some supposed 'authority' of norms worthy of recognition in (sufficiently ideal) moral discourse. These have whatever original authority communicative reason has. But this just sounds like a description of a 'horizontal' form of authority relationship in which norms that everyone accepts in the (supposedly) symmetrical

operates in moral discourse. The option of temporalizing the rightness predicate - saying the norm was right until its consequences and side-effects were clearly not in the equal interest of all and thereafter not right – is not available to Habermas unless he gives up a key analogy between truth and rightness: namely, that the rightness of norms, like the truth of propositions, is not a property that can be lost. This is part of what is entailed by saying they are 'universal' or 'context-transcendent' validity-claims that have a moment of 'unconditionality'.

<sup>&</sup>lt;sup>66</sup> Lafont, "Procedural Justice?", ibid., p. 169. If it is objected by the epistemic proceduralist that the latter construal of what rightness or justice means is too controversial for political justification, perhaps we can leave its definition open and hold on to a thin set of agreed contents like Estlund's primary bads and the pure procedural understanding of rational acceptability. However this might threaten to collapse the discourse theory into epistemic proceduralism.

<sup>&</sup>lt;sup>67</sup> Whether the resulting position is a kind of moral realism, as Lafont argues, can be left open for our purposes.

<sup>&</sup>lt;sup>68</sup> "The fact that there are *no alternatives* to these rules of argumentation is what is being proved; the rules themselves are not what is being justified" (MCCA, p. 95). What Habermas says of communicative action in general is true of moral discourse in particular: "there is no other equivalent medium in which these functions can be fulfilled" (MCCA, p.102; cf. the arguments on, ibid., p. 100). For discourse ethics, it is crucial to maintain the necessity of discourse as an epistemic means to moral knowledge and as a conceptual explication of moral impartiality. For arguments that it is not necessary to the explication of impartiality and that the moral reasons discourse tracks are just reasons of fairness, see Christopher McMahon, "Discourse and Morality", Ethics,

conditions of discourse have the power to require or forbid action. But there must be a 'vertical' authority relationship at some point. We are, after all, talking about politics. Where is the state apparatus and the formal decision-making bodies that claim to give laws that are

legislative decisions of this formal body can only adequately embody a form of *self*-legislation, and hence truly authorize legitimate coercion, insofar as *they* can be traced back to the 'original' authority (or non-authority from a Razian viewpoint) of the "jointly exercised communicative freedom of citizens", which supposedly "can assume a form that is mediated in a variety of ways by legal institutions and procedures".<sup>42</sup>

Yet something seems to be missing from the picture. Even supposing that it can

whom in conditions of a complex *division of sociomoral labor* (e.g., with regard to duties of aid or social welfare functions).<sup>5.</sup> As a result, "in complex societies, morality can become effective beyond the local level only by being translated into the legal code".<sup>5/</sup> But the first and the second factor seem clearly to be forms of just those indeterminacy and assurance problems that appear in Kant's argument, and the third is arguably simply another aspect of the indeterminacy problem. The difference between such a 'functional account' of why law is a necessary 'complement' to morality and the structural features of Kant's own argument is hard to see. Indeed, in an earlier essay Habermas mentions precisely the same factors and says that together they constitute "a moral reason for law in general" and even a "normative justification for the transition

thought above is correct, it is precisely because law is the only (available) medium to solve these problems that we are required to use it. This suggests that in principle the structure of Kant's argument could be reformulated within the discourse theory, modulo various adjustments having to do with certain fine details of metaethics.<sup>52</sup>

If this is right, we would have a neat way to present the Habermasian alternative strategy for dealing with epistocracy and providing an account of the authority and legitimacy of democracy. As we saw earlier, the intersubjective account of moral justification (and