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Questions About Normative Consent

Robert B. Talisse and Michael Harbour

David Estlund's *Democratic Authority* is a tour de force. Combining novelty and imagination with rigorous argumentation and full-contact engagement with a vast contemporary literature, Estlund develops a compelling case for an original version of a thesis that many democratic theorists tend to find odd, if not repellant: knowledge matters for political authority. Along the way, Estlund examines every major conceptual issue pertaining to democracy. Even those who have no interest in Estlund's positive proposal still have much to learn from his treatments of the concept of fairness, social choice theory, contractualism, social protest, and utopianism in political philosophy. In short, this is state-of-the-art democratic theory. We know of no recent book that matches its scope and depth.

Accordingly, we cannot hope to address Estlund's theory in any substantial way in this short paper. Our aim is decidedly modest. We want to isolate one of the crucial elements of Estlund's view and examine it. We are not sure whether what we have to offer rises to the level of being an *objection* just yet, so we take ourselves to be raising a few *questions*. Our intention is not to engage in root-and-branch critique, but rather to set out some points on an agenda for further work.

We will proceed as follows. First, we will sketch Estlund's view of democratic authority, a view which he calls *epistemic proceduralism*. Then we will show how epistemic proceduralism depends upon a certain general conception of authority, what Estlund calls the *normative consent* view. The normative consent view of authority is deeply intuitive, but, as we shall argue, it gives rise to certain puzzles which we should like Estlund to address. If Estlund is unable to respond to these concerns convincingly, the epistemic proceduralist program as he has presented it is jeopardized; if, alternatively, he is able to speak compellingly to these worries, we will have gained a deeper understanding of epistemic proceduralism.

I

One way of understanding epistemic proceduralism is to see it as an attempt to capture the virtues and avoid the vices of two more familiar views of political authority. On one such view, call it *fair proceduralism*, the authority of any political decision derives from its having been produced by a procedure which

instantiates fairness; the outcome's authority does not depend on an evaluation of its worth according to a standard independent of the procedure by which it was produced. Another familiar view, call it the *correctness* view, holds that political outcomes are authoritative only if they are correct according to some independent standard of justice. On correctness views, the authority of a political outcome does not depend on its having been produced by one procedure rather than another; the question of its authority is purely a question of its correctness.

Of course, these glosses are crude, and Estlund considers several distinct versions of each kind of view; however, these sketches are sufficient to help us to review Estlund's objections, which will in turn help us to place his epistemic proceduralism. As for fair proceduralism, Estlund argues that no account of the authority-bestowing

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property of any procedure that deserves to be called democratic can avoid making reference to procedure-independent standards.¹ To put the point another way, if, as the fair proceduralist alleges, authority owes entirely to the fairness of the process, why not opt for processes which seem to better instantiate that property? Estlund captures this thought in the "one-liner" for which he has become well-known: why not flip a coin instead?² The argument runs that any attempt to show that democratic voting is preferable to coin-flipping will inevitably invoke procedure-independent criteria. Hence, according to Estlund, fair proceduralism fails and we are forced to adopt a view of authority that recognizes some procedure-independent standards.

Correctness views embrace such standards. But correctness views tend towards political elitism, what Estlund calls *epistocracy*, rule of those who know best how correctly to decide policy.³ The challenge, then, is to "let truth be the guide without illegitimately privileging the opinions of putative experts."⁴ Estlund argues that correctness views are unacceptable because they violate a moral requirement for legitimate authority, what Estlund calls the *acceptability requirement*.⁵ Estlund's acceptability requirement is a version of the core liberal commitment that coercive political power is legitimate only if it is justifiable to all reasonable persons; in Estlund's formulation, "no one has authority of legitimate coercive power over another without a justification that could be accepted by all qualified points of

view.”⁶ Estlund’s argument against correctness views, then, can be stated succinctly: No proposed expert ruler, and no proposed substantive criterion of correctness, is beyond reasonable, or “qualified,” objection.⁷

Epistemic proceduralism falls neatly out of these critical maneuvers. Epistemic proceduralism holds that the authority of a political outcome derives, at least in part, from the epistemic power (viz., the tendency to reach correct decisions) of the procedure which produced it. Accordingly, like correctness views, epistemic proceduralism invokes epistemic criteria in its account of authority. However, unlike correctness views, epistemic proceduralism can acknowledge that outcomes can be authoritative even when substantively incorrect. In this respect, epistemic proceduralism is, indeed, a kind of proceduralism—the authority of a particular outcome owes to the procedure which produced it. Hence the nub of epistemic proceduralism: “Democratically produced laws are legitimate and authoritative because they are produced by a procedure with a tendency to make correct decisions.”⁸ Lest this look like a correctness view, Estlund emphasizes that in order to be authority-bestowing, a procedure must also satisfy the acceptability requirement; accordingly, it is crucial to add that democratically produced laws are authoritative because they are the result of a procedure that is epistemically the best among those procedures that could satisfy the acceptability requirement.⁹

According to Estlund, the authority of democratic political outcomes is structurally similar to the authority of the verdicts of juries. When a jury convicts Jones, that outcome is authoritative. That is, the jury’s verdict generates moral obligations for relevant parties to perform certain kinds of actions; jailers must not let Jones go free, for example. Importantly, these obligations stand even if the jury has erred—the fact that the jury delivered an incorrect verdict does not permit a jailer to let Jones go free. Why? Estlund argues that it would be difficult to see why jury verdicts are authoritative were it not the case that the jury system has a tendency, imperfect to be sure, to deliver correct verdicts.¹⁰

An important feature of epistemic proceduralism comes to light in the analogy with the jury. Even if one grants that the jury system (and the democratic process) is epistemically best among morally available options for deciding cases, one might still challenge the authority of jury verdicts (hence of democratic political outcomes) on the basis of the fact that one withholds consent to be under that authority. On standard and intuitive views of authority, there could be no authority-relation without the consent of those to be under the proposed authority; that is, on common views there could be no authority without consent. Epistemic proceduralism rejects this, holding instead that, like moral obligations of other kinds, obligations owing to authority “can simply befall us,” despite our never

having consented or even our withholding of consent.¹¹ On Estlund’s view, there are cases—perhaps very few—in which it would be wrong to withhold consent; in such cases, one’s non-consent is normatively powerless to block or cancel the authority relation that would have resulted from consent.

Estlund argues that the authority of jury verdicts and the authority of democratic laws are cases of this kind. That is, Estlund argues that there is a moral requirement to consent to the authority of democracy that is strong enough to override and render null anyone’s actual non-consent. Consequently, “any existing democratic arrangement” that meets certain modest conditions—such as being epistemically better than random and being the best arrangement that is acceptable from all qualified points of view—“has authority over each citizen just as if they had established its authority by actual consent.”¹²

This is Estlund’s *normative consent* theory of authority. It says that there are certain cases in which the fact that one *ought to consent* to some proposed authority relation is sufficient for there being such a relation.¹³ It is this aspect of Estlund’s view that we should like to examine more closely.

II

Part of what motivates the normative consent theory is the puzzling asymmetry in more familiar accounts which hold that consent is necessary for authority, the “*no authority without consent view*.”¹⁴ It is common for such theories to recognize cases in which one’s consent can be rendered normatively impotent, or *null*; for example, if consent is achieved through coercion or manipulation, the act of consent is insufficient to warrant the authority relation, and thus no authority is established. But these theories do not countenance the possibility of *non-consent* being null; on the familiar view, “non-consent establishes non-authority, no questions asked.”¹⁵ Why this asymmetry? If certain conditions can nullify consent, might there be conditions under which non-consent can be nullified as well? Might there be cases in which non-consent is powerless to establish non-authority?

Estlund argues that, indeed, when one is under an obligation to submit to the authority of another, then one’s refusal to consent is null; accordingly, in such cases, one’s non-consent is normatively impotent, and the authority relation that would have resulted from one’s consent is established.¹⁶ Hence the *normative consent* theory: The authority relation is established because one *should have* consented to it.

Estlund offers the following example as a case of normative consent.¹⁷ A flight attendant, attempting to aid injured passengers after a crash, commands one of the able bodied passengers, Joe, to do as she says. Estlund reasons that insofar as Joe has a duty to assist his fellow passengers, he has a further duty to submit

to the flight attendant's authority. The key point is that this will be true *even if* Joe happens to be morally depraved—or “despicable”—and refuses to obey the attendant's commands.¹⁸ According to Estlund, Joe's refusal to consent to be under the authority of the flight attendant does not free him of her authority; Joe is obliged to obey *as if* he had consented. Under these conditions, his non-consent lacks the normative force necessary to block or cancel the proposed authority relation. Joe's non-consent is null. Authority simply befalls Joe.¹⁹

But is Joe required to submit to the *authority* of the attendant? An intuitive alternative has it that although Joe should, indeed, act precisely as the attendant directs,²⁰ he is not required to submit to her authority. On this view, Joe must do as directed by the attendant, but only because Joe has obligations to help his fellow passengers, and the attendant knows best how to direct him to satisfy these obligations. Joe is required to submit to the attendant's *leadership*, not her *authority*;²¹ he must *follow* her directions, not *obey* her commands.²²

Estlund rejects this account of the case.²³ He argues that if Joe is required to do as the attendant directs simply as a means of meeting his obligations to assist the other passengers, then Joe has no obligation to comply with the attendant's directives in cases where the attendant errs. But, Estlund insists, Joe indeed does have an obligation to follow the attendant's directives in such cases (within limits, of course). Following Estlund's example, let us suppose that the attendant directs Joe to fetch some bandages when Joe correctly believes that securing fresh drinking water is of higher priority.²⁴ According to Estlund, this “modest” mistake does not “exempt” Joe from the duty to obey the attendant because she is “in charge.”²⁵ He concludes that “we should accept that authority is present to some extent so long as a duty to obey survives in some case of erroneous or wrongful commands.”²⁶

We doubt, however, that this is sufficient to establish that the relation which obtains between the attendant and Joe is one of authority rather than leadership. Two distinctions must be drawn in order to explore this issue. First, there are two senses in which the attendant's directive might be erroneous: they could be *incorrect* or they could be *unjustified*. An incorrect directive prescribes an action that is, in fact, not the right (or best, or correct) thing to do. In the case Estlund proposes, the directive to fetch the bandages is incorrect. Contrast this error with a directive that prescribes an action that is not based on, and may be inconsistent with, a responsible evaluation of the data relevant to the circumstances under which the directives are issued. If the attendant directs Joe neither to fetch bandages nor secure water, but instead to kneel and pray to Saint Christopher that he (the saint) might assist the injured travelers, she has made an error

that differs in kind from the error of directing Joe to fetch the bandages. The attendant has issued a directive that is *unjustified*, not based on a responsible evaluation of the circumstances.

An incorrect directive may be justified. The attendant's directive to fetch the bandages might be consistent with a responsible assessment of the circumstances, even though incorrect. Similarly, a correct directive might be unjustified, as it would be if the attendant directed Joe to secure the water on the basis of a coin flip. To help keep the independence of these two kinds of evaluations in mind, we might say that incorrectness (or correctness) is a property of the content of the directive, whereas unjustifiedness (or justifiedness) is a property of the person issuing the directives; the former evaluates the directive, the latter evaluates the agent. That the attendant has issued an incorrect directive need not result in a negative evaluation of the attendant, since although she issued an incorrect directive, she may have been justified.

The second distinction we want to introduce maps in a rough way the familiar distinction in epistemology between internal and external views of justification.

Estlund's case stipulates that Joe correctly believes that the attendant's directive to fetch bandages is incorrect.²⁷ But it helps to distinguish two senses in which this belief might be

said to be correct. In one of these senses, Joe correctly believes that he should secure the water simply by virtue of the fact that it is true that he should. In the other sense, the correctness of his belief depends upon Joe having *access* to the reasons which support his judgment that he should secure the water. Joe might believe that he should secure the water before fetching the bandages, and it might be true that he should, but Joe might not have access to the relevant reasons; his true belief that he should secure water might be due to a lucky guess. Beliefs that are formed improperly fail to be correct (in *some* sense of that word), even when true.

Return now to the case of Joe and the flight attendant. It seems relevant that the attendant's directive to fetch the bandages, though incorrect, is not unjustified. It also seems relevant that Joe, though he may have the true belief that he should secure the water, is likely to not have reasons for his belief that could override the reasons of the attendant. Recall that Estlund holds that the leadership reading of the case fails since Joe clearly is obliged to follow the attendant's directives even when the attendant errs. But once the relevant distinctions are introduced, it is not clear that the leadership reading can be defeated so easily.

Consider a more nuanced leadership reading. Joe has moral obligations to do what he can (within limits, of course) to assist the other passengers. It is natural to say also that the flight

*Therefore there is a difference
between a duty to defer and a duty
to obey.*

attendant, by virtue of her institutional role, is both epistemically well-placed to discern which actions Joe should take to satisfy his obligations to the other passengers, and morally obligated to direct Joe to perform the acts which, in her best judgment, are the ones Joe should perform in light of those obligations. Now, it seems to us that Joe is required to do as the attendant directs, even when she (*ex hypothesi*, incorrectly) directs him to fetch the bandages provided that the incorrect directive is (1) based on (or at least not obviously *inconsistent* with) a responsible assessment of the situation, and (2) Joe is (again, *ex hypothesi*) not in a sufficiently advantaged epistemic position relative to the attendant to override her judgment.

We take it that Estlund would concede this, and then simply add that the situation as we have described it is one in which the attendant has authority over Joe. But this is too hasty, for the case is plausibly described not as one of *obedience*, but rather *deference*. As we have said, Joe is required to do as the attendant directs because, given her institutional role, she is both uniquely well-placed to discern what he should do and morally required to direct him, to the best of her ability, to do what he ought to do. Hence Joe can confidently say of the attendant that if she is behaving as she should, her directives will track those actions which he would choose to perform were he as epistemically well-positioned as she. That is, Joe can reasonably judge that, if the attendant is doing her job, any directive she issues will reflect a reasonably well-grounded judgment about how he should behave given his moral duties to assist his fellow passengers. In this way, Joe *defers* to the attendant, he trusts her to make the judgments he would make himself, and to direct him to act in the ways that he would choose to act, were he in a suitable epistemic position. And this epistemic advantage implied by her institutional role in part accounts for Joe's obligation to defer.

Like a duty to obey, Joe's duty to defer to the attendant is the duty to do as she directs. And this duty can plausibly be seen to survive cases of directives which are erroneous due to their being *incorrect*, provided that they are not also *unjustified* and that Joe has no *internal* justification for believing they are defective.²⁸ So, Joe is required to fetch the bandages when directed to do so by the attendant even if in fact he ought to secure the water. However, Joe is *not* required to kneel and pray if directed to do so, because the attendant's directive to pray calls into question her fitness for her role. When directed to pray, Joe may reasonably evaluate the attendant as unable to direct him in ways which enable him to satisfy his obligations to the other passengers; she is no longer plausibly regarded as an adequate leader, and the duty to follow her directives dissolves.

This duty similarly dissolves when Joe is *internally justified* in thinking that the attendant's directives are mistaken. Suppose the attendant tells Joe to gather the bandages rather

than secure water because she erroneously believes that they have crashed near a stream comprised of undrinkable salt water. Suppose further that Joe happens to be a wilderness expert and knows definitively that the water is in fact fresh water. Joe recognizes the paramount importance of securing drinking water and reasons that this is what the attendant would have directed him to do if she had the requisite knowledge. Would it really be wrong for Joe to disregard the attendant's directives in this case? While Joe is under a general obligation to defer to the attendant, in this particular instance, Joe is in a better epistemic position than she to discern the best course of action. This of course does not eliminate his more general obligation to defer, but his duty to follow this particular directive dissolves. It would be odd if authority functioned in this way. While we might say that the attendant's *counsel* only has moral weight insofar as she holds a superior epistemic standing, authority entails something stronger.

Perhaps Estlund could concede what we have said about the case, and, again, contend that the relation that we have described is nonetheless one of authority. But it seems to us that we should be wary of calling the kind of relation which obtains between Joe and the flight attendant an authority relation. This is because the relation we have described is commonly found in cases that seem to not involve authority at all. Consider, for example, the relation that obtains between a coach and quarterback. If the coach calls a certain play, X, the quarterback must run that play, even if X is incorrect. Similarly, imagine that Joe is the primary caregiver of a seriously sick relative; if the relative's physician directs Joe to administer a certain drug once daily, Joe is morally required to do so, even if the physician has prescribed an incorrect dosage. Of course, the duty to follow the directives of the coach and the physician is limited in certain ways; a coach who called for an intentional fumble, or a physician who prescribed a regimen of sacrifices to Asclepius, would be rightly disregarded. In these cases, the incorrectness of the directives is not sufficient to dissolve the duty to act as directed, yet it is odd to say that the coach and physician have *authority* over the quarterback and caregiver. The relation seems like something weaker, like *leadership* or *counsel*; and the corresponding duty seems more like a duty to *defer* than a duty to *obey*.

Estlund might reply that we have an over-inflated view of the authority relation; he could argue that the deference/obedience distinction is a distinction that makes no difference. But deference is different from obedience. To see this, consider a case which should count as a case of authority on almost any view: While driving your car a police officer commands you to pull over. The command generates a moral reason to pull over that, in the absence of certain very specific defeating conditions, is sufficient to require the action of pulling over. Crucially, it is no part of the story of the normative force of the officer's command that you

can confidently judge that the officer is directing you to act as you would choose to act were you in her epistemic position. Indeed, the officer's institutional role does not imply any epistemic advantage over you at all. She commands you to pull over, therefore you pull over. That is obedience.

Deference is different. As we said above, deference involves the judgment that the person in charge is both able and morally required to direct you to act in ways that satisfy your independent moral obligations. If she issues a directive that is (to a sufficient degree) *unjustified*, or if she issues a directive that you are internally justified in thinking is incorrect, you may rightfully disregard her directive. Her leadership depends upon her ability to issue directives that are not egregiously unjustified or obviously incorrect. Once it is clear that following her directives will not enable you to satisfy your independent moral obligations, the duty to defer no longer holds.

By contrast, the authority of the police officer does not depend on any evaluation on the part of those subject to it. Nor is the authority of the officer contingent on her ability to issue commands that enable those under her authority to satisfy their other moral obligations. We might further say that the authority of the officer derives solely from her institutional role, and not at all from any epistemic advantage that those in that role tend to have over others. These differences seem sufficient to conclude that there is, indeed, a difference between deference and obedience. Therefore there is a difference between a *duty to defer* and a *duty to obey*.

Perhaps Estlund would respond that the difference between the attendant and the police officer is one of *degree*, not of kind. He could argue that, just as the police officer's authority has limits, the attendant's authority runs out when she directs Joe to act in ways not plausibly seen as contributing to the rescue effort. Authority, Estlund says, "is rarely if ever absolute."²⁹ It is important, however, to distinguish between two senses in which authority might be considered *absolute*. In one sense, authority can be absolute in terms of its *scope*. In this sense, authority is absolute insofar as one is obligated to obey any command that the authority might issue. Estlund is surely right in thinking that authority is rarely, if ever, absolute in this sense.³⁰ Even the police officer's authority is going to be severely limited in this respect. There are many actions the officer cannot rightfully require of you; for example, she cannot command you to directly inflict harm upon yourself. But, even when limited in scope, authority can be absolute in *force*. An authority's command has absolute force in that it generates a moral obligation to act as commanded, independent of any other considerations. That is, the force of the command stems solely from the authority of the

one who issues it. In this respect, the police officer's authority is absolute. Her command is by itself sufficient to generate a moral obligation to act as commanded.

This cannot be said of the flight attendant. The moral weight of her directives stems from her superior epistemic standing, and one is obligated to follow them only insofar as doing so is necessary to fulfilling one's independent moral obligations. Once it is clear that she no longer occupies this epistemic status, the duty to follow her directives *dissolves*. Accordingly, her directives have no moral impact of their own; whatever moral weight her directives have derives from one's *other* obligations. Again, this is not so for the police officer. While we could of course imagine cases in which the duty to follow the police officer's commands might be *overridden* by some other moral obligation, the force of her commands can never simply be dissolved in this manner.

To put the point more directly: When the officer commands you to

perform action z, and the action z is within the scope of the officer's authority, one has an obligation (absolute in force) to perform z. Under certain circumstances, of course, one's obligation to perform z might be *overridden*, in which case one may rightly disobey. But, importantly, this act of disobedience is nonetheless an act of violating an obligation. When the attendant directs you to perform action z, and action z is consistent with her being justified, one similarly has an obligation to perform z. However, if the directive to perform action z is unjustified, the obligation to perform z *dissolves*. In this kind of case, noncompliance with the directive is not warranted because some other moral obligation *overrides* the obligation to do as directed, rather, the moral force of the directive is simply *cancelled*.

While authority is almost never absolute in scope, it is necessarily absolute in force. Hence a theory of authority needs to be able to countenance cases in which the purported authority may rightfully require actions *simply* in virtue of her commands. We propose the following as an *adequacy condition* for a theory of authority:

If A has authority over B, there is some action, z, which A may rightfully command of B even when B has no independent moral reason to perform z.

By calling this an *adequacy condition*, we mean that any proposed theory of authority must satisfy it in order to count as a theory of *authority* (rather than a theory of something else, such as leadership). Estlund's examples of normative consent all involve the purported authority commanding actions that the person purportedly subject to her authority already has independent moral reason to

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perform. Hence it is not clear that the normative consent view is able to satisfy the adequacy condition. We wonder whether it could be a successful theory of authority. If the normative consent theory cannot succeed as a theory of authority, epistemic proceduralism, whatever its other virtues, cannot succeed as an account of democratic authority.³¹

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Endnotes

1. David Estlund, *Democratic Authority* (Princeton, NJ: Princeton University Press, 2008), 82.
2. 66.
3. 7.
4. 102.
5. 99.
6. 33. Rather than employing the Rawlsian term “reasonable persons,” Estlund formulates the principle in terms of “qualified points of view”; the terms do the same work, but Estlund notes that the Rawlsian term “reasonable” invites too many difficulties (44).
7. 99.
8. 8.
9. 8.
10. 8, 108.
11. 117.
12. 157.
13. 128.
14. 121.

15. 121.
16. 123.
17. 124.
18. 124.
19. 117.

20. We want to avoid begging any questions that the verb “commands” might occasion (e.g., it might be said that what is at issue is whether the attendant may command Joe, or it might be said that what is at issue is whether what the attendant directs Joe to do rise to the level of commands), so use the hopefully more neutral term “directs.” We will use this and related terms—such as “directives” and “directions”—to refer to a purported authority’s statements (to those purportedly under that authority) of the form “Do x.” Later, we will use the term “command,” but only in discussing a case that we think is unobjectionably one of authority.

21. 124.
22. 125.
23. 124.
24. 125.
25. 125.
26. 124.
27. 125.

28. Perhaps we should say that Joe’s duty to do as directed persists in the case of incorrect directives provided that they are not *egregiously* unjustified. That is, Joe’s duty to defer might survive certain cases in which a directive is both *incorrect* and *unjustified*, as when compliance with such a directive is extremely low-risk and other factors might make defection costly. But it seems that Joe may disregard a directive that is unjustified in a way so egregious that he, though he is no expert, could formulate the reasons which defeat the attendant’s judgment. There is certainly much more to say.

29. 124.

30. Certain versions of Divine Command Theory hold that God’s authority is absolute in scope: God could rightfully command a father to murder his innocent son, for example.

31. The authors would like to thank Scott Aikin, Caleb Clanton, Lenn Goodman, Gary Jaeger, Betsy Jelinek, Steven Maloney, Jonathan Neufeld, Peter Simpson, and Jeffrey Tlumak for helpful discussion.