

NORMATIVE CONSENT AND AUTHORITY

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Abstract: In his recent book *Democratic Authority*, David Estlund defends a strikingly new account of political authority that makes use of a distinctive kind of hypothetical consent that he calls 'normative consent': a person can come to have a duty to obey another when it is the case that, were she given the chance to consent to the duty, she would have a duty to consent to it. In this paper, I argue that the account Estlund develops is, in a crucial respect, incoherent: the principle of normative consent he offers relies on a claim about a hypothetical situation, but the hypothetical situation at issue is one that, according to the principle itself, is morally impossible.

1. INTRODUCTION

In his *Democratic Authority*, David Estlund defends a highly original account of the authority of democracy, what he calls 'epistemic proceduralism.'¹ Or, more precisely, he defends the "philosophical framework" of such an account.² One of its distinctive claims concerns the possibility of a hitherto unappreciated and potentially quite productive account of the basis of political authority. The problem of political authority and obligation is, of course, a central problem in political philosophy, and it is not often that someone offers an account of the basis for the duty to uphold the law that is both strikingly new and quite plausible. That Estlund has offered one is quite an achievement. My aim in this paper is to show that, despite its initial plausibility, Estlund's new account of political authority is ultimately unsuccessful: the central claims that make it a distinctive account also make it incoherent.

Estlund argues that authority can be based on a distinctive kind of hypothetical consent that he calls 'normative consent': a person can come to have a duty to obey another—or, that other can come to have authority over her—when it is the case that, were she given the chance to consent to the duty, she

¹ For a helpful overview of epistemic proceduralism, see Ch. 1 of Estlund's *Democratic Authority*, (Princeton: Princeton University Press, 2008), 1-20.

² As the full title *Democratic Authority: A Philosophical Framework* makes clear. Estlund discusses in some detail the precise task that *Democratic Authority* undertakes in his "Reply to Copp, Gaus, Richardson and Edmundson" in *Ethics*, 121 (2011), especially 354-359.

would have a duty to consent to it.³ To say that she would have a duty to consent to the duty to obey is to say that it would be wrong for her to refuse her consent. And, when such a refusal to consent is morally wrong, that attempted non-consent is morally ineffective, or, as Estlund puts it, “null,” and so the moral situation is as it would be if she did consent: she has the duty to obey. This principle of normative consent, Estlund argues, establishes the authority of democratically produced laws over citizens: when law is the result of a suitably democratic procedure, citizens have a duty to uphold that law, whether or not they have consented to that duty, because, if given the opportunity to consent, they would be morally required to consent to the duty and so to the authority of that law.⁴ Democratic citizens have a duty to uphold the law because they “would indeed be obligated to consent to the new authority of an epistemic proceduralist regime” if given the chance.⁵

Democratic Authority is concerned with political authority, and so Estlund’s arguments are focused on whether normative consent can ground the particular duty to obey that constitutes authority. Estlund himself raises some doubts about whether the principle of normative consent can ground duties other than the duty to obey.⁶ But, as others have recognized, Estlund’s account, if successful, does have the potential to apply to other kinds of duties in other contexts.⁷ And this, I think, is partly why his account of normative consent is so important. If successful, it opens up a genuinely new way to argue for a variety of special duties, not just the duty to obey an authority. Though my evaluation here of Estlund’s normative consent account maintains, for the most part, his focus on the duty to obey that constitutes authority, the argument as to why the account fails will apply not only to the duty to obey but to all other duties as

³ Estlund describes the normative consent account and defends it against several objections in Ch. 7 of *Democratic Authority* (2008), 117-135.

⁴ They would have a duty to consent to it because “the task of having people obligated to obey their district for the administration of public justice is an important task in its own right, important enough that each of us would be wrong to refuse to commit if offered the chance” and because of the comparative epistemic advantage of democratic governance: it makes better decisions than other “qualified” forms of governance. See Estlund (2008), 11.

⁵ Estlund (2011), 377.

⁶ For these doubts, see Estlund (2008), 126-127.

⁷ See, for instance, Ben Saunders’ use of the principle of normative consent to argue for an opt-out system of cadaveric organ donation: The now-deceased person need not have given her consent to cadaveric organ donation, for she had a duty to consent to such donation and, as a result, her refusal to do so is wrong and so null. The situation is as if she had consented to cadaveric donation, and so an opt-out system is morally justified. See Ben Saunders, “Normative Consent and Opt-Out Organ Donation” in *Journal of Medical Ethics* 36 (2010), 84-87.

well.

The task Estlund sets for himself in *Democratic Authority* is to defend epistemic proceduralism as a promising *approach* to understanding the possible democratic sources of political authority.⁸ And, as he claims, such a defense is an important first task in the defense of any new theory, for it is only if the overall approach has merit that we need care whether the individual steps in the approach can be defended. But this means that *Democratic Authority* does not claim to offer full defenses of any of the steps themselves, including a full defense of the principle of normative consent.⁹ Instead, Estlund's argument proceeds, at certain important points, according to what he calls "the 'method of the provisional leap'." On this method, "[w]hen a theory would benefit... from the positing of a certain step, and there is no strong reason to think that it is not true, then it is worthwhile to take a leap, [and] investigate the resulting theory."¹⁰ And, it is only if this investigation reveals the overall theory to be promising that the task then is to consider the posited step and whether there are strong (and preferably conclusive) reasons to think it true. In this way, Estlund's arguments on behalf of the normative consent account of political authority are, as he says later, "not... meant to be epistemic support for the principle of normative consent" but instead represent "an effort to raise the stakes and show that it might be worth serious investigation."¹¹ And his arguments on behalf of the normative consent account do, I think, succeed at raising the stakes in this way.

And so, the task I undertake here is to give the principle of normative consent the serious investigation as a promising account of political authority and obligation that Estlund has shown in *Democratic Authority* it merits.¹²

⁸ That this is his task in *Democratic Authority* is not obvious in the book itself. But Estlund makes it clear that it is his task in his "Reply" (2011), 355.

⁹ Estlund (2011), 357.

¹⁰ Estlund (2011), 358.

¹¹ Estlund (2011), 375.

¹² Henry Richardson's "Estlund's Promising Account of Democratic Authority" and William Edmundson's "Consent and Its Cousins," both in *Ethics* 121 (2011), each offer a critical discussion of Estlund's account of normative consent but neither discussion amounts to the sort of investigation I endeavor here. As Estlund (2011) rightly notes in his reply to their discussions, "[t]here is a pattern that unites many of the remarks of my commentators, and it goes like this: they identify what they take to be one of the central elements of the theory... and then point out that I have not offered much in the way of argument for that element" (354). Other critics of Estlund's account of normative consent also have not offered the sort of investigation I endeavor here. See, for instance, Gopal Sreenivasan's "'Oh, but you should have': Estlund on Normative Consent" in *Iyyun: The Jerusalem Philosophical Quarterly* 58 (2009) and Robert B. Talisse and Michael Harbour's "Questions About Normative Consent" in *The Good Society* 18 (2009). My aim here is not to point

Unfortunately, however, the results of this investigation are not promising for the principle, for the investigation reveals a problem internal to the principle of normative consent—an incoherence within it—that seems insurmountable. The problem, in short, is that the principle relies on a claim about a particular hypothetical situation, but the hypothetical situation at issue is one that, according to the principle itself, is morally impossible.

2. THE PRINCIPLE OF NORMATIVE CONSENT

But, before getting to the incoherence within the principle of normative consent, some preliminary work needs to be done spelling out with some precision the normative consent account of authority, for Estlund's characterization of it can have the effect of obscuring the incoherence within the principle. First, Estlund's presentation of his main example of normative consent fails to distinguish between cases where a person has a genuine duty to consent and cases where it only appears as if the person has such a duty, and this failure, by mistakenly including the latter as cases of normative consent, has the effect of obscuring the precise sort of hypothetical situation that the principle of normative consent relies on. Second, Estlund mistakenly counts the ability to refuse one's consent as the exercise of 'a moral power to withhold consent' rather than as the non-exercise of the moral power to give consent, and this mistake has the effect of obscuring the difficulties with the claim that the normative consent account actually makes, namely that the non-exercise of the moral power to give consent can be null because it would be wrong. This section discusses the first claim, the next section the second.

Estlund begins his defense of the normative consent approach in *Democratic Authority* by considering the standard consent account of authority. He formulates the standard consent account as follows:

Without consent there is no authority (the *libertarian clause*), but unless there are certain nullifying conditions (the *nullity proviso*), consent to authority establishes authority (the *authority clause*).¹³

Estlund's normative consent account, like other accounts of authority, rejects the libertarian clause. But it does so on a distinctive semi-voluntarist basis that shifts the focus from the moral power to consent to the moral power to refuse one's

out where Estlund fails to offer enough argument for the principle of normative consent but rather to show that such argument cannot be offered.

¹³ Estlund (2008), 119.

consent. His normative consent account might be formulated as follows:

There can be authority without consent (the *non-libertarian clause*), but unless non-consent (or, refusal to consent) to authority is morally wrong or is otherwise nullified (the *non-consent nullity proviso*), such non-consent establishes non-authority (the *non-authority clause*).¹⁴

As this formulation makes clear, Estlund's account allows that a person can simply find herself with a duty to obey another when her non-consent is (or would be) morally wrong. And so it has a semi-voluntarist basis: though a person has broad moral powers both to give and to refuse her consent to authority, both powers, properly understood, include nullity provisos that specify their scope; and certain cases of authority do not fall within the scope of the person's power to refuse her consent because of the non-consent nullity proviso.¹⁵

To see better how Estlund's normative consent account establishes authority, consider his example of Joe and the flight attendant (whom I will call Sally), for it is meant to be an example of authority that based on normative consent and normative consent alone.¹⁶

Consider a flight attendant [Sally] who, in an effort to help the injured after a crash, says to Joe, "You! I need you to do as I say!" Let us not yet suppose this puts Joe under her authority. Even if it does not, Joe would... be morally wrong not to agree to do as she says (at least under a significant range of circumstances). Once that is granted, the question remains whether by refusing, wrongly, to agree to do as she says, Joe has escaped the duty to do as she says.¹⁷

¹⁴ The non-consent nullity proviso makes special note of the one nullifying condition because this is the nullifying condition that Estlund discusses. Though other nullifying conditions for non-consent are certainly possible, the argument offered against Estlund's particular nullifying condition will apply to all candidate nullifying conditions for non-consent.

¹⁵ As Estlund puts the idea in Estlund (2008), "[y]ou are not under another person's supposed authority so long as you freely *and morally* decline to accept it" (131, emphasis in original). See also Estlund (2011): "while S' nonconsent to the authority in question would be decisive against the existence of authority if the nonconsent is itself morally permissible, if it is wrong, then it is null" (378).

¹⁶ As Estlund says immediately prior to offering this case of Sally and Joe, "Clearly, it would be helpful to have examples in which non-consent would be wrong, and in which this wrongness renders it null—cancels what would otherwise be the authority-blocking power of non-consent—with the result being authority" (123-124).

¹⁷ Estlund (2008), 124.

In this example, Estlund has us suppose with the consent theorist that Sally's authority is not yet established prior to the circumstances where Joe confronts the question of whether to agree to do as she says. Of course, the consent theorist will say that, by refusing his consent, Joe does escape the duty to do as Sally says. As Estlund explains:

Consent theory, with its libertarian clause, draws the libertarian conclusion: Joe may have various obligations in such a terrible scenario, but [Sally's] instructions have no authority over him. Why? Because, lucky for Joe, he is despicable.¹⁸

Estlund rejects both this conclusion that, by acting despicably, Joe can escape subjection to Sally's authority and, along with it, standard consent theory. Persons should not, the thought goes, be rewarded in this way for their moral flaws.¹⁹ Estlund continues:

Joe has not escaped the authority by refusing to consent. So he is under authority even without having consented. In this case, non-consent to authority is null. If this is granted, [standard] consent theory must be rejected.²⁰

Estlund is right to judge that, in this example, Joe is unable to escape subjection to Sally's authority by refusing to consent. He has a duty to obey her here. But this judgment about Joe and Sally – and the consequent rejection of standard consent theory – does not yet distinguish Estlund's normative consent account from other, "direct authority" accounts, for it may be that, contrary to the supposition, Joe's refusal to consent is null because Sally's shout (or some other prior facts) already put Joe under her authority and not because it is wrong.²¹ Of course, Joe's refusal here is wrong, but that may be because it is already null: Sally's shout (or some other prior facts) already put Joe under her authority.

¹⁸ Estlund (2008), 124.

¹⁹ It is not clear why we should think that Joe's successful avoidance here is a 'reward,' unless we should assume (implausibly) that subjection to an authority is always a burden to be avoided. Joe is not 'lucky' that he is despicable and so thereby avoids subjection to the flight attendant's authority, for there seems no reason why he should want to avoid subjection to her authority in these circumstances.

²⁰ Estlund (2008), 124.

²¹ By 'prior facts,' I mean, for instance, the urgent needs of the injured passengers, needs that Joe can do much to meet by working with Sally. If it is true that he can only meet them effectively by obeying Sally, then this might be sufficient to give Sally authority over him. This kind of account would be a version of what A. John Simmons has called 'necessity accounts' of authority. For his discussion, see Wellman and Simmons's *The Duty to Obey the Law* (2005), 127-142.

The burden of Estlund's normative consent account is to show that, even if Sally's shout (or some other prior facts) has not already put Joe under her authority here—that is, even with the consent theorist's supposition—Joe's refusal would be null and so he cannot escape Sally's authority, for it is only then that this case serves its purpose as an example “in which non-consent would be wrong, and in which this wrongness renders it null.”²² Consider Estlund's formulation of the principle of normative consent:

Normative Consent: Normative consent is present when it is the case that if you had been offered the chance to consent to authority, you morally should have consented, and as a result the authority situation is as it would have been if you had.²³

At first glance, the case of Sally and Joe would seem to fit the formulation as Estlund intends: Sally's shout offers Joe the chance to consent to her authority; his refusal would be wrong (“Joe would... be morally wrong not to agree to do as she says”); and the authority situation is as if he had consented (“In this case, non-consent to authority is null”). But that this case does seem to fit is actually a problem for this formulation of the principle, for it is not at all clear that what Sally has offered Joe here is the chance to *consent*.

Consider a case where it seems that someone offers another a chance to consent to the assignment of some right or duty and that other person morally ought to consent, but the right or duty in question has already been thus assigned prior to this consent situation.²⁴ Suppose, for example, the state decides to give all new parents the opportunity formally to agree to the duties of parenthood. Barring unusual circumstances, it might seem that all (or nearly all) new parents morally ought to thus agree to these duties. Accordingly, this might seem a case where the state is offering them a chance to consent to these duties and they have a moral duty to consent. But it is not such a case.

²² Estlund (2008), 123-124.

²³ Estlund (2008), 128-129. For similar passages see also Estlund (2011), 374, 384. Estlund does not himself identify this passage as a formulation of the principle. But, though he talks about ‘the principle of normative consent,’ he does not offer an official formulation of the principle and this passage does seem the closest to such a formulation.

²⁴ Throughout this discussion, I understand a person's authority over another—or, A's authority over B—to be A's right to decide for B what B is to do (within a certain specified range of circumstances). On a consent account of authority, then, A's right to decide for B what B is to do is a right that B has until B transfers it to A via her consent, and the transfer of this right is what gives A authority over B (and so gives B a duty to obey A). This seems in line with Estlund's understanding of authority and the duty to obey. See Estlund (2008), 118-119.

And that is because all (or nearly all) parents will already have these parental duties prior to the state giving them the opportunity formally to agree to them. And that the state decides to give them this opportunity does not make it the case that their parental duties now depend on their agreement, for the state does not have the moral power to take duties whose assignment are not dependent on the duty-bearer's consent and make them dependent on such consent. (Indeed, it is hard to think of any agent who does have this sort of power.) What the state offers them, then, is not the chance to consent in the standard sense—the state does not (and cannot) put them in a genuine consent situation with regard to their parental duties—but rather merely the chance to acknowledge publicly the duties they already have. And I will call this act of acknowledging publicly the duties that one already has 'consent*.' We can imagine cases where the parents would be morally wrong to refuse to consent* to the duties of parenthood when given the chance.²⁵ But, in these sorts of cases, the primary reason why is that a person who refuses to acknowledge the duties as parents that he or she already has is almost certainly to be someone who also fails to fulfill them. And so, when agreeing to a duty amounts to acknowledging that one already has this duty on other grounds, the wrongness of one's refusal is a consequence of the existence of the duty. In other words, refusal in this sort of case is both wrong and null because the duty already exists, not—if it is to be a case of normative consent—null because wrong.²⁶ And the case of Sally and Joe seems to be this sort of case:

²⁵ Suppose it is a suitably liberal-democratic state with a Scandinavian-style social-welfare system that is committed to seeing to it that children are well-taken care of in nurturing family environments. Suppose further that the state has instituted a non-intrusive but effective program for identifying both those parents willing and able, with suitable assistance, to take good care of their children and those who are unwilling. In this sort of context, it seems plausible to say that those parents who refuse to consent* to their parental duties when asked, say, by a caseworker do something wrong. As Anthony Reeves rightly reminded me, there are many situations where a person would have perfectly good reason not to publicly acknowledge the duties she has, reasons that are very much compatible with her acknowledging to herself that she does have those duties. The claim here is not that refusing to consent* is always wrong, only that it is sometimes wrong, and the Sally and Joe case seems a case where it is wrong.

²⁶ Estlund misses this point in his response in his "Reply" (2011) to an objection Edmundson raises about the case of one roommate (A) wrongfully refusing ever to allow via his consent the other (B) to play his stereo. For the objection, see Edmundson (2011), 343. Edmundson and Estlund agree that, at a certain point, A's refusal no longer has the effect of blocking the permissibility of B's stereo playing. The disagreement concerns what accounts for this change. Estlund remarks that, "by objecting (withholding consent) too often, A has landed himself in a situation in which his nonconsent will be null. That is precisely my view. To say that A's nonconsent is null is just to say that B's permission to play the stereo is morally unopposed by it, just as if A had consented" (386). But Edmundson's point, I take it, is that we can understand what happens here either as A's refusal

Sally has authority no matter whether Joe agrees to it or not, and so, though his refusal would be both wrong (as a refusal to consent*) and null (as an attempted refusal to consent), it would be both wrong and null because Sally already has authority over him.²⁷

The problem seems to be that the principle of normative consent makes use of a particular hypothetical case—it is the morality of refusing to consent in this hypothetical case that matters—and Estlund’s Normative Consent formulation fails to specify the relevant hypothetical case. One might think that Normative Consent’s phrase ‘if you had been offered the chance to consent to authority’ refers to whether Sally shouts to Joe, “You! I need you to do as I say!” for this shout would count as Sally offering Joe the chance to consent. Estlund’s point, then, would be that it does not matter whether Sally does shout this, for Joe’s refusal would be null if she did shout it (as it is in the case where she does). This understanding of the principle would make the Sally and Joe case that Estlund presents the hypothetical case: Sally has authority in a case where she does not offer Joe the chance to consent—where she does not shout—because, if she did offer him that chance—if she did shout—it would be wrong of Joe to refuse his consent to her authority. But, if the Sally and Joe case is the relevant hypothetical case, the fact that it seems merely a consent* situation poses a problem for the normative consent account’s claim that the wrongness of Joe’s refusal is the basis for Sally’s authority, since what makes Joe’s refusal wrong is that Sally’s authority already exists.

Suppose instead that the case where Sally does shout is rather the actual case—Sally has authority in this case on account of Joe’s normative consent—and so it is not a problem that Joe’s refusal there is merely a refusal to consent*. (In this case, then, Sally does not offer Joe here the chance to consent but rather merely the chance to consent*. Indeed, that is all she has the power to offer him.) According to the normative consent account, what gives Sally authority in *this* case where she does shout is the wrongness of Joe refusing consent in the

becoming both wrong *and* null because B comes to have this permission or as A’s refusal becoming null because it would be wrong. The difference here rests on the source of the nullity of non-consent. Estlund’s view is not, as he suggests, simply that A’s refusal at some point becomes null but that it becomes null in the latter way rather than the former.

²⁷ The formulation of the principle is not the only place where Estlund seems not to rule out these cases. Consider his claim in Estlund (2011) about the sort of connection to the agent’s will that normative consent is concerned with: “the agent, so long as she operates within morally permissible bounds, would have willed it if asked” (375). This connection obtains in the parental rights case even though it is not a case of normative consent, for what makes it morally required that she wills her parental duties is that they already exist.

relevant hypothetical case, and, if it is to be Joe's consent rather than his consent* at issue, the hypothetical case must be a case where Sally does not already have authority. Her authority must be *new*. In the hypothetical case, then, what Joe would be wrong to refuse to do would be to refuse to *give* this authority to Sally as *new* authority, and, though wrong, his refusal would not be null: it would successfully block Sally's proposed authority over him. In the relevant hypothetical case, then, Joe is in a *standard* consent situation: the right in question—here, the (limited) right to decide what Joe is to do here—is only assigned to Sally if he actually consents to that assignment, for his actual consent is what accomplishes it.²⁸ And, Joe would be wrong in this hypothetical consent situation to refuse to give her this authority by refusing his consent.

This move avoids the circle that seemed to snare Estlund's Normative Consent: Sally has authority in the actual case—the one that Estlund presents where she does shout—prior to Joe's decision to give or refuse his consent* to it because, were Joe in a standard consent situation where Sally only has this (new) authority if he does consent to it, he would have a duty to give his consent. On this new formulation of the principle of normative consent:

Normative Consent 2: Normative consent is present when it is the case that, if you had been in a standard consent situation concerning this authority, you morally should have consented, and as a result the authority situation in the actual case is as it would be in the hypothetical case where you do give your consent.

And so, while Joe's refusal in the actual case would be both wrong and null because Sally already has authority—his refusal here would be merely a refusal to consent*—she has this authority in the actual case because, in a hypothetical situation where Joe's refusal to consent would *not* be null, it would be wrong.²⁹

What can appear at first glance to be 'someone offering another the chance to consent' may actually be only the chance to consent*. Despite what Estlund seems to intend with the case of Sally and Joe, the case, as he presents it, is

²⁸ That this is right way to understand the hypothetical case is supported by Estlund's explanation of a different, political hypothetical case in his "Reply" (2011): "if... a person S, who is now a denizen of an epistemically competent democracy, had been offered the chance to establish the authority of such a regime over her by consenting to it, it would have been wrong for her not to do so" (380). Here, the important phrase is "the chance to establish the authority," for this indicates that S, unlike Joe in the case as Estlund presents it, is in a standard consent situation.

²⁹ And so, the original Joe and Sally case is somewhat misleading. The wrongness of Joe's refusal is not what does the work of normative consent; it, along with the nullity of his refusal, is rather the result of Joe's normative consent.

merely a case of consent*: when Sally shouts to Joe “You! I need you to do as I say!” her shout offers him, not the chance to consent, but rather only the chance to consent*. And the normative consent account is committed to this understanding of this case, for it asserts that Sally’s authority in this case does not depend on Joe’s consent. But, if Sally’s authority (and so Joe’s duty to consent*) depends instead on Joe’s normative consent in this case, then the task is to specify the relevant hypothetical case. And, in the relevant hypothetical case, it is not that Sally shouts to Joe or not—since whether she give him the chance to consent* is irrelevant—but that, unlike the actual case, Joe *is* in a standard consent situation with regard to Sally’s authority. Sally has authority over Joe regardless of his consent in the actual case because, were he in a standard consent situation with regard to her authority, he would have a duty to give her that authority via his consent. In this way, the distinctive claim of Estlund’s normative consent account is that a person’s attempt at refusing to consent to another’s authority can be null (and so merely a wrongful refusal to consent*) *solely* because, were it not null—were it successful at blocking that person’s authority—it would be wrong. The wrongness of refusal that makes such refusal null is not, as Estlund’s discussion of the Sally and Joe case suggests, the wrongness it has when it is null but rather the wrongness such refusal would have were it *not* null.

3. A MORAL POWER TO WITHHOLD CONSENT?

Estlund thinks the distinctive claim of the normative consent account can be put as the claim that the moral power to refuse consent, like the moral power to give consent, comes with its own particular nullity proviso. The previous section’s results, put in these terms, would be: A person’s attempt to exercise her moral power to refuse her consent can be null (and so merely a wrongful refusal to consent*) *solely* because, were that attempt not null—were it a successful exercise of that moral power—it would be wrong. In this section, I show that it is a mistake to describe refusing one’s consent as the exercise of a separate moral power to withhold consent, and I argue that describing it as such obscures in important ways the extent to which the claim that non-consent can be null is a very different sort of claim than the claim that consent can be null.

Standard consent theory attaches a nullity proviso to the moral power to consent: a person’s attempted consent is sometimes null—the situation is as if she did not consent—when that attempted consent is given under certain

conditions, such as coercion or duress.³⁰ But, Estlund asks, why is it that a refusal to consent cannot also be null? There seems to be, he notices, “an interesting asymmetry of a sort” in standard consent theory: “Consent only establishes authority if it meets certain standards, whereas non-consent establishes non-authority without the need to meet any standards at all.”³¹ But, as he observes, the ability to refuse consent can be valuable in the same way as the ability to give consent: “[o]ften it is a source of freedom and power to be able to refuse to consent to something and thereby prohibit certain actions of others.”³² Because of this similarity, he suggests, the claim that non-consent (or, refusals to consent) can be null “has some standing on grounds of symmetry.”³³ Granted, this claim does not amount to much of an argument, and Estlund does not intend it to do so. It is another instance of his use of the method of the provisional leap. But it is still an important claim. In his “Reply,” Estlund reconstructs his argument for normative consent, and step 1 is: “The nullity of a refusal of consent by a person to some authority would put that person in whatever authority situation she would have been in if she had consented.”³⁴ His argument cannot get off the ground unless it makes sense to talk not just of the nullity of consent but also of the nullity of non-consent, and it seems that non-consent can be null only if refusing (or withholding) consent is itself the exercise of a moral power.

Why might it be that non-consent can be null only if refusing (or withholding) consent is itself the exercise of a moral power? A moral power, roughly, is the ability to bring about a moral change merely by expressing the intention to make such a change, for it is the expression that does it. Consenting is such a power, as is promising or commanding.³⁵ And so, when exercised successfully, a moral power changes the moral situation from what it had been and would have continued to be absent the exercise of that power. Since the

³⁰ For discussion of the notion of nullity proviso and the nullity proviso attached to the power to give consent, see Estlund (2008), 121-123.

³¹ Estlund (2008), 121.

³² Estlund (2008), 125.

³³ Estlund (2008), 123.

³⁴ Estlund (2011), 379.

³⁵ Or, to be precise, legitimate instances of consenting, promising and commanding are exercises of moral powers. To consent, promise or command is only to attempt to exercise a moral power; not all attempts to exercise a moral power are successful. For discussion of consent as a moral power, see Joseph Raz’s *Morality of Freedom*, New York: Oxford University Press (1986), 80-85, and A. John Simmons’ *Moral Principles and Political Obligations*, Princeton: Princeton University Press (1979), 75-77.

moral basis for the change is nothing more than that exercise of the moral power, a justification of the new distribution of rights and duties must include, as a reason, that particular exercise of the moral power. If some person's exercise of the power is to justify the change in the moral situation—justify it, in particular, to those others affected by the change—there must be sufficient moral reason for allowing this person the moral power in the situation. And to offer these moral reasons for the moral power is not only to justify that power but also, in doing so, to limit its use by defining its boundaries. Any attempted use outside of these limits, because they cannot be included among the legitimate exercises of the moral power, are unsuccessful or, in Estlund's terms, null. Despite the person's intentions, the moral power was not exercised. And, when a moral power is not exercised—either because no attempt was made or because the attempt was unsuccessful—the moral situation remains as it was prior to the attempted exercise of the moral power, for whatever moral reasons justified the distribution of rights and duties continue to do so.

Consider the moral power to (give one's) consent. This power, in short, consists in a limited prerogative to decide on the assignment of certain rights and duties. And it is an important moral power, for it allows a person some ability to shape her moral world in the service of her own projects, cares, commitments and relationships.³⁶ For example, I am able to transfer (temporarily) some of my ownership rights in my car to a friend by letting her borrow the car to go get an ice cream sundae. By consenting to her use of my car—by temporarily transferring to her certain of my enjoyment rights over the car and thereby making her action of driving my car to the ice cream parlor permissible—I am able to use my ownership of this car to cultivate our friendship in the way I wish.

That the moral power to consent gives a person this ability forms the basis of its justification. When a person possesses a consent prerogative over some right or duty, it is because this person's interest in freedom (or self-determination) trumps or overrides, in the situation, whatever other interests, his own or others', might be served by the possible assignments of the right or duty in question. And so, even though exercising a right to use my car to get an ice cream sundae may serve certain of my friend's interests, my interest in freedom—the interest served by possessing the moral power to consent—overrides or trumps those interests. If I refuse to lend her my car because I might need it to run some errands or to go on a scenic drive, she may not use my car. And she may not

³⁶ For discussion, see, for instance, Raz (1986), 86-88, and Seana Shiffrin's "Promising, Intimate Relationships and Conventionalism" in *Philosophical Review* 117 (2008), 502.

even if her interests would be better promoted by her using my car that day than mine would by my using it, or even if I have no reason at all for thinking that I might need it or want to use it. I have the prerogative to decide whether to transfer these enjoyment rights to her because they are my rights: I own the car.³⁷ But, it must be noted, it is not because I refuse her that she may not use my car. She may not use it even if I ignore her or even if I fail to hear her request, for it is not my refusal that prohibits her use but the prior fact of my ownership over the car.

Why a nullity proviso to this moral power to consent? As the exercise of a moral power, giving one's consent changes the moral situation not only for oneself but also, often, for others. The moral basis of this power to consent is that it gives the person some freedom to shape her own moral world: the exercise of this power is an exercise of the person's freedom. This is the basis of the moral power also defines, and limits, it: the various nullifying conditions grouped together as 'the nullity proviso' are exactly those conditions that, if present, prevent the candidate exercise of consent from being an exercise of that person's freedom. Some of the nullifying conditions—that the consent was given under duress or coercion, for instance—ensure that only those candidate acts of consent that accurately express the agent's will count as genuine acts of consent. Estlund calls these "will-tracking nullifying conditions."³⁸ That acts of consent are subject to these will-tracking conditions seems unproblematic, for they can only be exercises of the agent's freedom if they express the agent's will.

But that acts of consent express the agent's will is not enough for them to count as genuine exercises of freedom. As Estlund notes, most consent theorists hold that certain rights are inalienable; on these views, an agent's attempts to relinquish these rights via consent are null, even if the agent does genuinely intend to relinquish the rights. Take the broad right of self-government (or, autonomy): to relinquish this right to another would be to consent to be that person's slave, and there seems something problematic about the claim that freedom includes the prerogative to relinquish one's freedom. And so, all attempts to consent to slavery are null, even those attempts that do accurately express the agent's will. This sort of nullifying condition to the moral power to

³⁷ Estlund admits this about this sort of case in Estlund (2008): "[Y]ou may not borrow my car to go to a movie without my consent even if I am wrongly withholding it" (126). This is one of the non-authority situations where Estlund thinks that the wrongness of non-consent does not render it null.

³⁸ Estlund (2008), 122.

give consent Estlund calls an “external normative nullifying condition.”³⁹ What is particularly important though, and what Estlund fails to mention, is why consent requires a nullity proviso in the first place: as an ability to change the moral situation, not just for oneself but for others as well, the moral power to consent requires justification and so definition—what counts as genuine consent and what does not—and the nullity proviso is a part of that definition.

And so, what about what Estlund calls “the moral power to withhold consent”?⁴⁰ That Estlund understands ‘moral power’ as I have defined it is revealed in his use of the ‘thereby’ in his claim that “[o]ften it is a source of freedom and power to be able to refuse to consent to something and thereby prohibit certain actions of others.” Here, the exercise of power to refuse is what makes the actions prohibited—the refusal changes the moral situation—or so the ‘thereby’ signals. As I suggested earlier, just like my ability to lend my friend my car, my ability to refuse do so allows me to tailor the distribution of rights in light of my own projects, cares and relationships. By refusing to lend her my car I can ensure that, should the desire strike me, I am able to run some errands or go for a scenic drive. I can also, by refusing, convey to her some sense of my conception of our relationship, its strength and bounds. Why, then, not attach a nullity proviso to this power, particularly a nullity proviso that includes the external condition that non-consent is null if wrong? Doing so would enable us to deny that a person can profit from wrongfully exercising this moral power, and, as Estlund suggests in the case of Sally and Joe, this is something we are right to deny.

But this ‘thereby’ in the claim above is out of place: in the normal case, which is what Estlund is concerned with here, refusing to consent to something does not thereby prohibit the actions at issue—it does not change the action from permissible to prohibited—for the refusal to consent is merely the refusal to make permissible via the exercise of the moral power to give one’s consent what is already prohibited. It is a refusal to make a change to the moral situation. In a case of refusing consent, unlike a case of giving consent, the justification of the distribution of rights and duties post-refusal need not refer to the refusal itself, for those moral reasons that justified the distribution of rights and duties pre-refusal continue to do so.

³⁹ And that this kind of nullifying condition attaches to the moral power to give consent is important for Estlund’s argument, for the nullifying condition Estlund claims for the power to refuse consent is itself an external one.

⁴⁰ For this phrase, see the section title at Estlund (2008), 125.

Consider again the case of lending my friend my car, but suppose I wrongfully refuse to lend it to her. In this case, it is not my refusal itself that makes her use of my car prohibited. My refusal does not change the moral situation: her use of my car is already prohibited by my ownership of the car. Indeed, I only have the prerogative to give her the right to use my car via my consent because, prior to exercising this prerogative, the right to use the car is mine and not hers. It is not the case, then, that my refusal to lend her my car thereby prohibits her use of my car. Suppose we claim that, because it would be wrongful, my refusal is null.⁴¹ This claim that my refusal is null is not, as the supposed symmetry between consent and non-consent would imply, the claim that my attempt to make her use of my car prohibited is unsuccessful. In the normal case of even wrongful refusal, it already is prohibited. Rather, the claim that my refusal is null is the claim that the change in the moral situation occurs—her use is no longer prohibited—even though the moral reasons justifying the prior moral situation of prohibited use remain in place and I did not exercise my prerogative to change that situation.

In the normal case, a refusal to consent in a genuine consent situation simply leaves the moral situation—the distribution of rights and duties—as it is. There is no moral change at issue, and whatever moral reasons justified the prior distribution of rights and duties continues to do so. This is why refusing one's consent is not the exercise of a moral power that changes the moral situation at issue. And it is misleading for Estlund to describe it as such, for it makes the claim that non-consent can be null seem like the unproblematic mirror of the claim that consent can be null: the nullity of refusal, like the nullity of consent, simply leaves the moral situation as it was prior to the refusal. What his account really says is that, at least with regard to cases of one person's authority over some other, the change to the moral situation that gives that one (new) authority over the other—the transfer of that right—takes place even though those moral reasons that justify the prior moral situation of non-authority remain the same and no one has exercised a moral power to change that moral situation into one of authority.

⁴¹ As I noted in fn 39, Estlund is inclined to think that wrongful refusals of consent in cases like this cannot be null. I am using this case of lending my car to my friend because it is a more straightforward case of consent/non-consent than authority cases—authority is a somewhat unusual right—and so this case works better for the purposes of illustrating precisely what the claim that non-consent can be null really means. I do not mean to imply here that Estlund endorses the thought that non-consent can be null in cases such as this one. All I assert here is that, were non-consent null in a case such as this, it should be understood in the way I describe it.

In other words, in asserting that a person's refusal to consent to authority can be null when it would be wrong, what Estlund's account claims is that that this person's moral power to consent to this authority can, in effect, be exercised *for him* when his refusal to exercise it himself would be wrong.⁴² This is a very different sort of claim than the more straightforward claim that the moral power to consent can be null, and describing it as the claim that the moral power to withhold consent can be null obscures this difference in ways that makes it hard to evaluate properly the claim that non-consent can be null.

4. THE INCOHERENCE WITHIN THE PRINCIPLE OF NORMATIVE CONSENT

That there not a separate moral power to withhold consent, and so no separate question about when attempts to exercise it are successful or null, is important not only because it accounts for the asymmetry Estlund notices between consent and non-consent but also because it points to a problem internal to the very notion of normative consent. The principle of normative consent cannot be the more straightforward assertion that there are limits on the exercise of the moral power of non-consent, and so the claim that a person's non-consent can be null because it would be wrong is really the claim that his attempt to decide not to exercise his moral power of consent to a change the moral situation can be null—despite his decision, the change occurs—solely because, were that decision not null, such a decision would be wrong. And this claim is incoherent.

Recall Normative Consent 2 and what it says about the case of Sally and Joe. In the original case, Joe is *not* in a standard consent situation—Sally's authority does not depend on his consent—but Sally's proposed authority is nevertheless *new*: Sally's shout itself does not put Joe under her authority, nor do any other prior facts (or any combination of them). In this way, the normative consent account is neither a consent account nor a direct authority account, but some third kind. What accounts for Sally's authority in this case? The following: were Joe in a standard consent situation here—were it the case that Sally's authority

⁴² Though Estlund does not put it this way, I think we can understand his claim that non-consent can be null as the claim that the person's moral power to consent can be exercised for him when he wrongfully refuses to exercise it himself. Estlund acknowledges, if he did actually give his consent, then that consent would ground authority; and Estlund emphasizes several times that the authority in question is *new*: it is not grounded in any prior facts such as, in the case of Sally and Joe, Sally's shout. (The only problem with thinking of it as the person's moral power being exercised for him is that there is no one that does the exercising: it is the situation—particularly the wrongness of his refusal—that accomplishes it.)

did depend on his consent—refusing his consent would be wrong. What accounts for Sally authority in the actual case, then, is this fact about the hypothetical case.

A difficulty arises, however, when we compare the actual case and the relevant hypothetical one. In the actual case, Joe does not have the prerogative to decide whether the right to decide what he is to do post-plane crash—the right that constitutes Sally’s authority—is transferred to Sally; in the hypothetical case, he does have this prerogative. And this seems to be the only difference between the actual and the hypothetical cases: In the former, Joe is in a consent* situation; in the latter a genuine consent situation.

But this difference is not a minor one, and it cannot be the only relevant difference between the cases, for a situation where Joe has the prerogative to decide whether Sally has this authority will be different in other important ways than a situation where he does not have it.⁴³ Recall that a person only has such a prerogative with regard to the transfer of some right if his interest in freedom as self-determination trumps (or overrides), in the situation, whatever other interests, both his own and others’, might be served by the transfer itself. In other words, there must be a moral basis in the circumstances for the possession (or not) of this prerogative. And so, if Joe is to have the prerogative in the hypothetical but not the actual plane crash case, the balance of interests—his own and the others’—cannot be the same in both versions of the situation. If Joe’s interest in freedom does not give him this consent prerogative in the actual case, then it also should not in the hypothetical case, unless that interest is somehow stronger or the others’ interests somehow weaker (or fewer in number) in the hypothetical case. If Joe’s interest in freedom does give him this prerogative in the hypothetical case, then it should also in the actual case, unless that interest is somehow weaker or the others’ interests somehow stronger (or more numerous) in the actual case. It cannot be that the only difference is that Joe has the prerogative in one case and not in the other, for the same set of circumstances cannot justify both his having this prerogative in one situation and his failure to do so in the other.

In this way, to give Joe this consent prerogative in a hypothetical case in

⁴³ Here is where it becomes crucial to maintain the distinction between being put in a consent situation and being put merely in a consent* situation, for being put in the latter *is* a minor change. Sally’s shout by itself may very well be all that’s needed to put Joe in a consent* situation, and the only difference between a case where Joe is in a consent* situation and one where he is not is the presence or absence of her shout; the rest of the circumstances remain identical.

which the circumstances are identical to those in the actual situation where he lacks the prerogative would be to make a hypothetical case that is morally incoherent: he has the prerogative in a case in which, according to the other circumstances of the case, he does not have it. In making a judgment about such a case, it would certainly *seem* clearly wrong for Joe to refuse his consent to Sally's authority, but that would be because those considerations that seem to make refusing consent clearly wrong actually justify denying him the consent prerogative altogether in that case.

This problem cannot be repaired by changing some of the circumstances in the hypothetical case so that the interests of the fellow passengers are weak enough compared to Joe's interest in freedom to justify finding Joe in a consent situation here. Suppose, for instance, that the passengers' injuries in the hypothetical case, unlike the actual, are relatively minor and easily tended to. In this different hypothetical case, Sally's authority would not be as morally important as it might seem in the actual case, and so it would be plausible to say that, in this hypothetical case, it is up to Joe to decide whether to give Sally the right to determine how he is to help them, even if we should also say that it would be wrong for him to refuse to give her that right via his consent. While this change in the circumstances of the hypothetical would make the case morally coherent, it would at the same time make it mysterious why the fact that it would be wrong for Joe to refuse to give Sally authority via his consent in this quite different airplane crash case should have the moral significance in the actual airplane crash case that the principle of normative consent gives it. Why should Joe's duties with regard to Sally and the severely injured passengers in the actual case depend on the moral status of a refusal to consent in a very different hypothetical case?

Estlund might respond that this objection misses the crucial difference between the cases, the difference that justifies finding Joe in a consent situation in the hypothetical case and not in the actual one. Because it is this difference that does the work, Estlund might say, the other circumstances can be identical in both without making the supposition of a consent situation in the hypothetical case arbitrary. And this difference has to do with the fact that obtains in the actual case *about* the hypothetical case, namely the fact that it would be wrong (in the hypothetical case) for Joe to refuse his consent. The idea here is that, if this fact about the hypothetical case did not obtain in the actual case, Joe would be in a consent situation in the actual case; this is what makes Sally's authority new in the relevant sense. But, because this fact does obtain, Joe is not in a consent situation in the actual case and so Sally has authority regardless of how Joe

actually responds to her shout.

But this response will not rescue the principle of normative consent from this objection, for the difference it claims to find is not actually a difference between the two cases. That it would be wrong (in the hypothetical case) for Joe to refuse his consent, if it is true of the actual case, will be true not only of the actual case *but also of the hypothetical case itself*. And, because it will also be true of the hypothetical case, it cannot be what explains why, in the hypothetical case, Joe is in a consent situation in which his refusal to consent would be wrong while, in the actual case, he is merely in a consent* situation where his refusal to consent* would be wrong.

Another way to put this objection to Estlund's normative consent account is to point out that the fact that makes it the case that Sally has authority over Joe, when it obtains in the actual case, will also obtain in the relevant hypothetical case. And, when it does obtain in the actual and so also in the hypothetical case, it will have the same normative consequences in the hypothetical case as it does in the actual case, which is to give Sally the authority regardless of Joe's consent. But, if it does have the same normative consequences in the hypothetical case, then Joe is *not* in a genuine consent situation in that case and so the fact about the hypothetical case that is supposed to give Sally authority in the actual case does not obtain. Estlund's normative consent account is, in the end, incoherent: If Sally has authority regardless of Joe's consent in the actual case on account of Joe's normative consent, then she does also in the hypothetical case, but, if she does also in the hypothetical case, then Joe's normative consent is not present in the actual case and Sally does not have authority on account of it.

5. CONCLUSION

As I discussed, one of the distinctive claims of Estlund's 'epistemic proceduralism' concerns the possibility of a hitherto unappreciated account of the basis of political authority. Estlund argues that authority can be based on a distinctive kind of hypothetical consent that he calls 'normative consent': a person can come to have a duty to obey another—or, that other can come to have authority over her—when it is the case that, were she given the chance to consent to the duty, she would have a duty to consent to it. The task I undertook here was to give the principle of normative consent the serious investigation that Estlund's *Democratic Authority* has shown that it merits. And the results, unfortunately, were not promising for the principle, for the investigation

revealed a problem internal to the principle of normative consent—an incoherence within it—that seems insurmountable. The problem, in short, is that the principle relies on a claim about a particular hypothetical situation, but the hypothetical situation at issue is one that, according to the principle itself, is morally impossible. And this problem with the principle is not specific to the attempt to ground the duty to obey that constitutes authority but rather is one that would arise for attempts to use the principle of normative consent to ground any moral duty.⁴⁴

⁴⁴ I thank Sara Streett and Anthony Reeves for their questions and criticisms. They have made the paper much better than it otherwise would have been.