

The Nullity of Non-Consent Revisited

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Abstract

According to David Estlund's establishing criterion of political authority, normative consent: if someone has a duty to consent to the authority of the state but refuses to consent instead, then this non-consent is nullified and thereby authority is established. But as I will argue in this paper, normative consent does not establish authority for two reasons. Firstly, I will argue that once we distinguish different reasons for nullification, it becomes clear that nullified non-consent should result in the *ineffectiveness* of the putative non-consent to have the normative power to establish non-authority but not in qualified consent as Estlund claims. Secondly, even if nullified non-consent would result in consent, it still could not establish authority because normative consent cannot escape what we might call the *bypass objection*. According to this objection, whatever background fact determines whether someone has a duty to consent would be the genuine ground of authority and normative consent does not play a role in the establishment of authority. As I will discuss, normative consent does not even *partially* ground authority.

Key words: political authority, David Estlund, consent, normative consent, democracy, epistemic proceduralism, grounding, obligations

SECTION I: Authority and Normative Consent

All states claim authority over their citizens, that is, they issue orders – usually by passing laws – with the intention that they are followed by their citizens. But insofar as democracies are committed to individual liberty and personal autonomy as central political values, how can democratically produced laws claim to have authority over each and every citizen? Even if we do not take authority in the *de facto* sense, meaning the brute power of a state to enforce its laws through coercion and force, but rather in the *legitimate* sense, as the *moral power* to require action, this seems to be incompatible with the supposed *natural freedom* of each (Simmons 1979; Wolff 1970).

The consent tradition of political authority offers an attractive solution to this problem of political authority. In general, consent can be interpreted as a Hohfeldian normative power, which is able to bring about normative change (Koltonski 2013: 259). As Heidi M. Hurd (1996: 123) has famously stated, “consent turns a trespass into a dinner party; a battery into a handshake; a theft into a gift”. Thus, by requiring the

subject of a proposed authority to give a clear sign of willingness beforehand to be under that authority, the consent tradition solves the apparent contradiction between authority and autonomy.

This however leads to a problem, as it could give people the chance of escaping the authority of a perfectly just state on immoral grounds. For example, some people might only want to enjoy the benefits of the state without having to comply with any commands that they do not personally like (Christiano 2012). Therefore, the consent tradition might go too far in respecting the will of the subject (Richardson 2011: 309).

David Estlund (2008) takes on this problem and questions whether it might be the case that when one has a duty to consent to the authority of another, that authority might be established even if that person actively refuses to consent. He develops this account from noticing an asymmetry between consent and non-consent within traditional consent theories. While consent can be nullified in some cases, such as if the consent is given under duress or if one consents to something highly immoral, if non-consent is given, authority is blocked no matter what. By appealing to the symmetry between consent and non-consent, Estlund considers the possibility of nullified non-consent. Given that when one consents to something immoral, that consent is nullified and the moral situation is just as if non-consent has occurred. By symmetry, if one refuses to consent without any moral justification, this non-consent is nullified and the moral situation is just as if consent has occurred. In the case of political authority, Estlund goes on, the authority situation would be as if consent had occurred if the non-consent of a citizen is nullified, hence, authority is established even if someone actively refuses to consent without any moral justification. This is what Estlund calls *normative consent*.

But, as I will argue in this paper, this account is mistaken for two reasons. First, nullified non-consent does not actually result in consent. This first argument concerns the reasons for nullification as well as the resulting condition of nullified non-consent. As I will argue, Estlund does not differentiate between consent that is nullified because of duress and consent that is nullified because of its immoral content. Furthermore, he also does not differentiate between two possible resulting conditions of nullification, even though he briefly introduces both. Once we distinguish between the different reasons for nullification, it becomes clear that nullified non-consent should render that putative non-consent's normative power ineffective rather than establishing authority. Second, by extending on the so-called bypass objection to normative consent, I will secondly argue, that normative consent does not establish authority even if nullified non-consent would result in consent, as Estlund argues. According to the bypass objection, whatever determines the duty to consent is the

genuine ground of authority and normative consent does not, after all, play a role in its establishment. As I discuss, Estlund tries to escape this objection by appealing to the debate on metaphysical grounding, but once we take the grounding terminology more seriously, this only puts normative consent into further question. Thus, I will conclude that normative consent does not play even a partial role in the establishment of authority.

SECTION II: The Resulting Condition of Nullified Non-Consent

In this section, I will begin by discussing what exactly “nullification” consists in. And before we can turn to the possibility of nullified non-consent, we need to first examine the nullity of consent in more detail, as the former is based on the latter. Taking a closer look at the concept of nullification will then let me question whether nullified non-consent does establish authority as Estlund argues.

According to most traditional consent theorists, consent is both necessary and sufficient to establish authority. But the sufficiency of consent to establish authority might be overruled – *nullified* – for moral reasons. According to Estlund (2008: 121), traditional consent theories distinguish between two such reasons. Either consent is nullified because

1. someone gave their consent under duress, or
2. someone consents to something highly immoral.

The second reason is somewhat contested within the consent tradition. Some, such as Hugo Grotius, have argued that consent cannot be nullified for its immoral content (Grotius 2005: 261). But, as this would render it possible for someone to enslave themselves, others, such as John Locke, have argued that consent should be nullified if someone consented to something highly immoral (Estlund 2008: 122). The first reason, on the other hand, is not contested within the consent tradition. If someone gave their consent only because they were forced to do so, then traditional consent theorists agree that this putative consent should be nullified.

We might further wonder, what exactly the nullity of consent comes down to. According to Estlund (2008: 121), if consent is nullified, we can distinguish two resulting conditions. Either

- (A) the resulting condition is one of non-consent, or
- (B) the normative power of the (putative) consent to establish authority is rendered ineffective.

As traditional consent theorists take consent to be necessary for authority to be established, they do not have to differentiate between the two resulting conditions. In both cases, non-authority would be established.

Estlund diverges from the traditional consent theory here when he proposes the possibility of nullified non-consent. He does so by appealing to the symmetry between consent and non-consent. But just as the traditional consent theorists, Estlund does not differentiate between the two resulting conditions when he extends the possibility of nullification to non-consent.

Estlund argues that if one immorally refuses to consent to the authority of the state despite having a duty to consent, then this non-consent would be nullified and the moral situation is just as if consent has occurred. Thus, he bases the nullity of non-consent on the first resulting condition (A). Given that the resulting condition of nullified consent is non-consent, then by symmetry, the resulting condition of nullified non-consent is one of consent. Drawing then on the sufficiency of consent to establish authority, Estlund argues that authority is established. He does not, however, consider the second possible resulting condition of nullified non-consent (B) that is, that the putative non-consent's normative power is rendered ineffective.

Following Thomas Christiano, we might wonder if Estlund chose the correct resulting condition, or as Cristiano puts it, whether "Estlund has genuinely identified the fallback point of invalidated consent and non-consent. Perhaps the proper description of the fallback point is neither consent nor non-consent. A person who has consented to something deeply immoral doesn't thereby refuse consent to that action, the person simply has failed to do anything morally productive" (Christiano 2012).

While Christiano simply states this as a possibility, I believe that there is actually more to this. As I will argue, there is a relevant difference between the reasons for nullification that should also extend to the resulting conditions of nullification. Just as Estlund does not differentiate between the resulting conditions of nullified consent, he also doesn't differentiate between the reasons for nullification. But consider the following two cases that should make it clear that we should differentiate between the two reasons for nullification:

If I only consent to be part of Tony's mobster gang *because he holds a gun to my head*, this is different to me consenting to be part of Tony's mobster gang *because I truly want to be a mobster*.

In the first case, my consent would be nullified because (1) of duress. In the second case, my consent would be nullified because (2) of its immoral content. While in the first case, the underlying reason why my putative consent would be nullified is that I *do not want* to become a mobster, in the second case, the underlying reason would be that I *do want* to become a mobster but this desire is highly immoral. Therefore, we should differentiate between the two reasons for nullification.

As I would further argue, if we differentiate between the reasons for nullification, then we should also differentiate between the resulting condition of nullification. If my consent is nullified because (1) of duress – I *did not want* whatever I putatively consented to – then it seems plausible to say that the moral situation is (A) just as if I refused my consent, that is, as if non-consent was given. Put differently, if my consent to Tony would be nullified because of duress, then the moral situation should be as if I refused my consent to Tony because that is what I would have done if Tony wouldn't have held a gun to my head. In this case, the resulting condition of nullification is the very same situation, which I wanted to bring about in the first place but which I was prevented from by Tony's immoral duress.

If, on the other hand, my consent would be nullified because (2) of its immoral content, then it seems more plausible to say that (B) that putative consent did not have the normative power it would have had. If my consent is nullified because I want something immoral, then it seems odd to say that the moral situation is just as if I *refused* my consent. After all, I truly want to be a mobster and the reason why my consent to Tony would be nullified is simply that I should not become a mobster, even if I truly want to. Thus, if my putative consent to Tony is nullified because (2) of its immoral content, it seems more plausible to say that (B) my consent did not have the normative power it would have had.

Extending this to the discussion of nullified non-consent in the case of political authority, we can see that normative consent cannot establish authority the way Estlund intended. According to Estlund, if someone refuses to consent to the authority of the state and that person has a duty to consent, then the resulting condition should be one of consent. This would only be the case if nullification because (2) of the immoral content of (non-)consent, would result in (A) (non-)non-consent. Which, in the case of nullified non-consent, would be consent.

But, as we have just seen, if (non-)consent is nullified because of (2) the immoral content of the putative (non-)consent, then (B) that (non-)consent did merely not have the normative power it would have had. Thus, it seems like Christiano was right in claiming that Estlund did not identify the right resulting condition, or “fallback point” as Christiano calls it, of nullified non-consent.

But what does this mean for the establishment of political authority? If someone's non-consent to the authority of the state is nullified and nullification result in (B) the mere ineffectiveness of that non-consent, then this simply means that the putative non-consent did not have the normative power of establishing *non-authority*. Thus, we neither have authority nor non-authority according to this.

Nonetheless, as Thomas Christiano briefly considers, nullity as ineffectiveness might also get us closer to authority.

Usually, if someone refuses to consent this is the end of the story. If, for instance, someone refuses to consent to have sex with me, I certainly should not ask them again and again. Their non-consent should settle the matter once and for all. And according to the traditional consent theory of authority, correspondingly, if someone refuses to consent to the authority of the state, this is the end of the story, as non-authority is established. But, and this is where nullified non-consent might come in, if someone's non-consent is nullified, we can ask that person again and again until the person does consent (Christiano 2012). Hence, even if the possible nullification of non-consent due to (2) does not immediately get us the authority situation we were hoping for, at least, it leaves open a door that would otherwise have been closed.

I grant that this still seems like a serious weakening of a much more promising account. While nullified non-consent that results in consent can establish authority, nullified non-consent that results in the ineffectiveness of that non-consent to establish non-authority cannot establish authority on its own. Thus, Estlund or any other proponent of normative consent might argue that the serious upshot of normative consent to establish authority cancels out the problems I have just worked out. But as I will argue subsequently this is not the only problem for normative consent. In fact, in the next section, I will show that normative consent does not after all establish authority even if nullified non-consent would result in consent as Estlund argued. For this, I will extend on the ongoing debate about the so-called bypass objection to normative consent.

SECTION III: The Bypass Objection

Normative consent is a type of hypothetical consent theory and such theories are subject to what we might call the transitivity objection. The worry is that normative consent – being a hypothetical consent theory – does not play a role in the establishment of authority. According to Estlund (2018), it is not at all obvious if this objection succeeds in the case of normative consent. Yet, as I will argue in this section, the problem for normative consent is not that it evokes a hypothetical situation but rather that it evokes a special kind of hypothetical situation. Therefore, normative consent fails in establishing authority even if other hypothetical consent theories might not.

Hypothetical consent theories stipulate some relevant similar situations to the real given circumstances, in which consent would do the proposed normative work. The general worry about hypothetical consent theories is that the relevant background

facts that determine the outcome of that hypothetical situation could do the proposed normative work on their own. If, for instance, a doctor wonders whether or not it would be permissible for her to administer a transfusion to an unconscious patient (the normative work to be done by the theory), she would not have to ask whether or not that person would have consented to the treatment if conscious (the proposed hypothetical situation), but rather whether or not that person wants to go on living (the background fact which determines the outcome of the hypothetical situation). Hence, the worry goes, the background facts could make the transfusion permissible on their own.

At its core this objection is concerned about the kind of relation between the different properties that are involved in the hypothetical consent account. These properties stand in some sort of non-causal priority or *grounding* relation. The three properties involved in such cases are, first, some property *x* which is to be made permissible by hypothetical consent, second, hypothetical consent, and third, some relevant background facts which determine whether or not hypothetical consent is present. If the grounding relation between *x* and hypothetical consent, and hypothetical consent and the relevant background facts is transitive, then *x* could be directly grounded by the relevant background facts. Hence, the objection might be formulated as follows:

1. Relevant background facts ground the hypothetical consent.
2. Hypothetical consent grounds *x*.
3. By transitivity: The relevant background facts ground *x*.

Within the literature about grounding, most theorists indeed take grounding relations to be transitive, diminishing the prospects for any hypothetical consent theory to do the normative work it sets out to do, including normative consent (Litland 2013, p. 19). Yet, as David Enoch (2017, p. 12) argues, it is not clear whether or not grounding is transitive across *different kinds of properties*. He wonders whether it may make a difference if, for instance, some property grounds another *metaphysically* and that property in turn grounds a third property *normatively*. Enoch uses this consideration as a possible way out of the transitivity objection for hypothetical consent in general. He stipulates that in a case like the medical ethics example used before, transitivity might not hold (Enoch 2017, p. 12):

“This may be so, for instance, if the patient’s (motivating) reasons why she would have consented had she been conscious are not in fact good (normative) reasons, namely, they don’t count in favor of accepting the transfusion. In such a case, it’s not clear that the transitivity move succeeds—it may be guilty of equivocation”.

If the unconscious mobster Silvio is brought into the ER, and the relevant background fact why Silvio wants to go on living is that he wants to kill the FBI witness Adriana, then, it is not clear whether the transfusion would be made permissible by the background facts. So, even if hypothetical consent is grounded by some other property, it still might do the normative work it sets out to do. While the prospects of this in the case of hypothetical consent in general will not concern me further, this consideration shows us why normative consent most certainly does not play a role in the establishment of authority even if hypothetical consent in general might. In the case of normative consent the relevant background facts are *normative* properties, just as normative consent, which is a *normative* power, as well as authority, which is the *moral* power to require action. Hence, all three properties in the case of normative consent ground each other in the same way:

1. Normative background facts *normatively* ground normative consent.
2. Normative consent *normatively* grounds authority.
3. By transitivity: The normative background facts *normatively* ground authority.

Even if transitivity might not hold for hypothetical consent in general it most certainly does hold in the case of normative consent. Normative consent employs *normative* background facts, and therefore, it drops out of the grounding set of authority, as it can be bypassed by these.

3.1. Does Normative Consent Play a Partial Role?

Estlund already anticipates a possible reply in case someone is not convinced by his claim that normative consent is “what does the work”. Therefore, he also considers the possibility of the background facts doing *some* work, but still, Estlund argues, this leaves open the possibility for normative consent to play a part too. Or as he says, authority might “at least partly” be grounded in normative consent (Estlund 2018: 363). Estlund does not elaborate on this so I am not exactly sure what to make of his reply. What does it mean for one property to *partly* be grounded in another?

According to Krämer and Roski (2017), **the fact that P** grounds **the fact that Q** only if **fact P** makes a difference to the occurrence of **the fact Q**. Under this interpretation of “being partly in virtue of”, **the fact that P** is a partial ground of **the fact that Q** only if **the fact that P_i** is part of **the plurality of facts Γ**, where $\Gamma = \{\text{the fact that } P_1, \text{ the fact that } P_2, \dots\}$. And $\Gamma < Q$, which stands for the claim that **the plurality of facts Γ** fully grounds **the fact that Q** (Krämer and Roski 2017: 1195). Krämer and Roski further argue that to judge whether P_i is part of Γ , we have to compare a scenario in which P_i is present with a scenario in which it is not present. Now if Q is present, given

that P_1 and P_2 are present, but Q is not present, given that only P_1 is present and P_2 is not present, then P_1 is part of the plurality of facts Γ , which fully ground Q . Or, as Krämer and Roski (2017: 1196) also put it, “[a]nother way to make the point is by asking what we can add to the fact that P to obtain a full ground of the fact that Q ”.

Now that we have got a better understanding of the notion of partial grounding what does this mean for normative consent? Estlund seems to say that normative consent (P_1) is part of the full ground (Γ) of authority (Q), where $\Gamma = \{\text{normative consent, normative background facts}\}$. Then this would mean that if the normative background facts are present but normative consent is not present, authority must not be present. In other words, Estlund needs to show that normative consent adds something to the establishment of authority, that is not already present simply in virtue of the normative background facts.

I am not sure what Estlund could have in mind here. He argued that under normative consent as an establishing criterion for authority, the subjects of the putative authority would not even have to be asked for their consent in the first place, as this would give them only a “morally trivial choice: whether to consent without moral effect or refrain without moral effect” (Estlund 2008: 128). Hence, Estlund makes it seem like the background facts are the *only* thing that makes a difference to the occurrence of authority. According to the notion of a *partial* ground though he would need to show that normative consent makes such a difference.

Therefore, the prospects of normative consent seem extremely weak. Not only can the normative background facts seemingly ground authority by themselves, but normative consent does not appear to be a partial ground of authority either.

SECTION IV: Conclusion

I have argued in this paper that normative consent does not establish authority for two reasons. First, the nullity of non-consent more plausibly results in the ineffectiveness of the normative power of the putative non-consent to establish non-authority. The reason for this is that Estlund does not differentiate between, first, the reasons for nullification, and second, the resulting conditions of nullification that he himself has introduces when considering nullified consent. If someone’s (non-)consent is nullified because of (2) the immoral content of the putative (non-)consent, then, as I have argued, the resulting condition should not be one of non-consent or consent but rather (B) the putative (non-)consent’s normative power to establish (non-)authority should be rendered ineffective.

Second, even if nullified non-consent would result in (A) consent, normative consent does not establish authority. Whenever someone’s non-consent is nullified,

there have to be some normative background facts present that establish authority directly. As I have shown by contrasting normative consent with hypothetical consent, if we want to establish authority, the *normative* background facts are already sufficient to *morally* ground authority. Neither does normative consent partly ground authority. After all, it does not seem to add anything new to the establishment of authority that was not already present in virtue of the normative background facts. Therefore, normative consent does not establish authority.

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