Inside Public Reason


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Gerald Gaus’ The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World is a big book in its title and its length and much more importantly in its intellectual ambition, breadth, complexity, and power. Gaus draws upon an extensive knowledge of recent and not so recent moral and political philosophy, game theory, moral psychology, experimental economics, experimental philosophy, and evolutionary theory. In this account and preliminary assessment of The Order of Public Reason I seek to focus on some of the most important structural features of Gaus’ doctrine and to go on to identify what seems to me to be some of its core potential problems. Almost certainly I will be under-reporting and under-appreciating certain features of Gaus’ position and seeing potential problems where Gaus sees solutions.

The Core Ambition of The Order of Public Reason

Gaus’ ultimate goal in The Order of Public Reason is to give an account of the function of morality as a set of justified authoritative—but not authoritarian—rules that are crucial for the cooperative interaction of the individuals who are governed by those rules. To be justified and to merit their authoritative role, these moral rules must be justified to each of the individuals whose compliance is demanded; and this justification must itself be a matter of each of those individuals having sufficient reason—based upon their own “evaluative standards”—to endorse and internalize those rules. Only if the moral rules are subject to public justification in this sense will the authority of morality (and of persons who invoke those moral rules) be compatible with the autonomy and equal standing of the individuals who are called upon to comply. Only if the moral rules are subject to public justification in this sense will Rousseau’s project of reconciling authority and autonomy be fulfilled.

One needs to emphasize that Gaus’s essential concern is with justifying the authority of morality and reconciling the authority of moral rules with autonomy. Gaus is impressed both by the power of moral prescriptions to guide our conduct and the need for our conduct

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to be guided by such rules if we are to achieve mutually beneficial coordination. Indeed, with respect to the power of moral prescriptions, Gaus seems to hold that one’s deployment of such prescriptions to get others to act as one desires is at base as problematic and in need of justification as is one’s deployment of billy clubs. Guidance of either sort is authoritarian unless it is justified to the subject of the guidance. So Gaus joins J. S. Mill in being as concerned about what Mill called “moral coercion” as what Mill called “physical coercion.” However, unlike Mill, Gaus thinks that we need authoritative (and non-political) moral rules and that such authoritative rules can be publicly justified. Hence, in a departure from Mill that I do not think he notes, Gaus holds that some of what Mill called “moral coercion” is publicly justified.

Gaus, then, takes the core task of The Order of Public Reason to be the reconciliation of “the authority of social morality” with “our status as free and equal moral persons.” (xv) However, in contrast to Rousseau, Kant, and Rawls, Gaus insists that public justification must face (a) and (b) and not evade the fact of deep reasonable pluralism. This is the fact that at least in our modern world individuals differ from one another significantly in their evaluative standards and, hence, they differ significantly from one another in their reasonable assessments—including their reasonable assessments of proposed moral rules. There is no one right perspective—e.g., the perspective of the individual who has surrendered his particular will and embraced the general will, the perspective of the noumenal self, or the perspective of the individual who (by stepping behind the Rawlsian Veil of Ignorance) is shorn of all knowledge of his own desires, goals, and capacities—on the basis of which a unique proper ranking of alternative moral rules is to be discovered.

Rather, in our world reasonable people pervasively differ from one another in their values, ends, and commitments and (perhaps even more pervasively) in their ranking of these diverse values, ends, and commitments and in their weighing of these values, ends, and commitments against one another. Public justification must engage in the difficult task of showing that some set of rules is reasonably endorsed and internalized by all members of a deeply diverse public. As Gaus puts it,

In an account of real public reason, the aim of moral theory is not to paint pictures of an ideal world but to show how we can achieve a real social morality that meets the test of moral acceptability of the real reason of moral agents. (446)

Gaus does not deny that some extraordinary individual might discover the uniquely best evaluative standards for all members of society, i.e., might discover which considerations (with which weightings) yield the rationally best assessments of proposed rules. Such a discoverer would see that there is reason for all individuals to favor rule R over no rule at all and over all competing rules (for a given domain of decisions). Nevertheless, Gaus maintains that the possibility of such an axiological discoverer is irrelevant to the question of public justification. For what matters for public justification is that each individual has (sufficient) reason within her actual evaluative standards. “I have not,... been concerned with... what reasons there are, but what reasons people can be said to have.” (233) To justify a rule to an individual is not to show that there is reason for her to endorse and internalize it; rather it is to show that the reasons she has in virtue of her evaluative standards favor that rule. (An agent, though, can have reason—indeed, sufficient reason—to endorse and internalize a rule without acknowledging or even realizing that she has that reason. An agent will have reason to favor a rule if good deliberation on the basis of her evaluative standards would reveal that reason to her.)

The discoverer’s pronouncement of his philosophical discovery would be significant for public justification only if it would move others to convert to the discoverer’s evaluative
standards. For then they would come to have the same reasons that the discoverer has for the assessment of moral rules. At that point, what was justified to the discoverer would come to be justified to them as well. But I presume that Gaus thinks, even if there were such a discoverer, the discoverer’s pronouncement would be perceived by others merely as an articulation of one among many reasonable grounds for the assessment of rules. At least many of these other agents would not trade in their evaluative standards for that of the discoverer. Hence, the discoverer’s insistence that these other agents endorse and internalize the rules that, by hypothesis, she sees there is reason for all to favor will remain an unacceptable authoritarian demand. The discoverer would be demanding that these others act on her reason not their own and, hence, would be demanding that they betray their own rational nature and autonomy. For any individual to demand that others affirm or abide by moral rules that differ from the rules that these others have reason to favor is for that individual to disrespect the moral equality of her fellows.

Something more needs to be said about why Gaus asserts the need for authoritative rules. Mutually beneficial cooperation is threatened whenever in Prisoner Dilemma-like situations individuals may be able to more advance their own values and ends by exploiting others’ cooperative behavior or may be able to protect themselves from others’ attempts to exploit them by themselves defecting (declining to cooperate). In such situations the rationality of achieving one’s values and promoting one’s ends seems (at least) to direct individuals to defect even though mutual defection leaves everyone worse off in terms of their value-achievement and end-promotion than they would be were everyone to cooperate.

It looks as though only if individuals take themselves to be required to abide by certain rules—e.g., rules mandating respect for others’ freedom or property, fulfillment of agreements and reciprocity in the conferral of benefits—will they forego attempts at exploitative defection and not feel the need to engage in self-protective defection. It looks—somewhat paradoxically—as though only if individuals take themselves to be required to abide by such rules independently of whether that conduct advances their values and ends will those individuals coordinate in ways that best advances their respective values and ends. “Moral rules are required if we are to advance our ends, but they are not merely servants of our ends” (xvii), and they advance our ends precisely because they are not merely servants of those ends.

We need authoritative moral rules; we need to have the moral authority to demand that others abide by moral rules—if we are to have the coordination to mutual advantage which it is the function of morality to provide. Also, according to Gaus, those rules will be justified and non-authoritarian only if they are justified to all individuals who are supposed to be governed by them. The problem is that reasonable convergence on any set of rules seems unlikely given deep reasonable pluralism. We should note here that Gaus understands rules to be much less abstract and more determinate than principles. Since the role of rules is to enable us to have settled expectations about the actions of one another so that we can navigate our social lives, knowing that others will be abiding by a given rule must pretty much tell us how that individual will be behaving. Rules are something like determinate interpretations of principles and there will always be reasonable disputes about how best to interpret any principle. For that reason, reasonable convergence upon rules that are determinate interpretations of principles is always more difficult than reasonable convergence on those principles. (Gaus acknowledges that morality also involves diverse personal ideals that one may even call upon others to adopt—but without taking that call to be authoritative and without being indignant if that call is not heeded.)
Purpose-Pursuit Versus Rule-Following

There is, however, an appealing alternative to the idea that the moral rules that we need are not merely servants of our ends. This is the “instrumentalist” view that the only thing that makes an agent’s compliance with rules rational is the contribution of that compliance to the promotion of that agent’s values or ends and the rule compliance that we need is rational for each agent because of its contribution to the promotion of that agent’s ends. Gaus offers a wide-ranging and powerful critique of sophisticated versions of the instrumentalist view.

Three main conclusions emerge from this critique. First, no instrumentalist view—no matter how sophisticated—gets agents to a level of rational commitment to rules that rescues us from the allure of rational strategic defection. “[T]he instrumentalist cannot show... how we can ‘bootstrap’ effective constraints out of our goal promoting reasoning.” (101-2) Second, instrumentalist accounts fail to provide agents with the right sort of reason for compliance with rules, viz., reasons that are not merely a matter of an agent’s own values and ends being promoted. And third, rules are often as much followed for their own sake as ends are pursued for their own sake. The motivation for rule-compliance is often not the promotion of ends that this compliance may portend. Our attachment to rules is also manifested in our disposition to punish rule-violators and even to punish easygoing rule-followers who will not themselves punish rule-violators. We are disposed to such action even when it is far from obvious that the benefits to us in terms of value or end promotion exceed the cost to us of inflicting the punishment. Rule following punishers take center stage in Gaus’ analysis of social morality. (261) We should note, though, that Alf’s “punishment” of Betty may consist merely in Alf being less disposed to cooperate with Betty for awhile. It need not at all involve the use of billy clubs or jail cells. After all, the moral rule that Betty has violated or the violation of which Betty has declined herself to punish may well not be one that justifiably calls for punishment that involves physical injury or confinement.

The overall conclusion of Gaus’ critique of the instrumentalist position is that “our reasons to obey [morality] are, to a significant degree, autonomous of its ability to promote our ends and goals.” (6) Indeed, Gaus calls for a rejection of the view of human action as entirely goal-related that Mill expressed in the first chapter of Utilitarianism, viz., “All action is for the sake of some end, and rules of action, it seems natural to suppose, must take their whole character and colour from the end to which they are subservient.” In contrast to Mill and the instrumentalist, Gaus affirms (101) F.A. Hayek’s claim that “Man is as much a rule-following animal as a purpose-seeking one.” As we shall see, Gaus further maintains that rule-following is as rational as purpose-seeking.

The rule-following dimension of our nature is seen in the fact that individuals cooperate much more than would be predicted on the assumption that they are rational and single-minded pursuers of ends and in the fact that children are strongly disposed to recognize, comply with, and assess negatively non-compliance with rules. The rule-following dimension of our nature is indeed a (biologically or culturally) evolved solution to our need for cooperation generating rule-compliance that goes beyond instrumentalist reason. Our moral emotions focus on rule-compliance or rule-violation by ourselves and by others and are themselves (among other things) part of an evolved overcoming of barriers to mutually beneficial coordination. “[D]eontological,” rule-based reasoning that does not derive from instrumenta reasoning... is required to solve the problem that [instrumentalists] posed.” (100)
Gaus does not think that our disposition to abide by cooperation enhancing rules and to punish (in some sense) non-compliers is merely a bit of useful arationality. His reason for thinking this merits notice. Rules provide us with reasons to act by way of our “placing value directly on following [those] rules. (145) If one cares about abiding by a certain rule, that concern as much gives one a reason to abide by the rule as one has reason to promote a certain end if one has that end. Caring about rule-compliance is on a par with having certain desires or ends as sources of reasons. Thus, it is important that Gaus does not challenge the instrumentalist’s view that (ceteris paribus) a desire provides its subject with reason to act to satisfy that desire even if reason is silent about the merit of that desire. For this allows Gaus to hold that caring about complying with a rule provides one with reason to comply even if reason is silent about the merit of that rule.

[1]he standard instrumental view does not provide significant rationality conditions on what ends a person may endorse..., whatever “mystery” surrounds the idea that rules “create reasons,” it cannot be that a “caring for” can ground a reason, for that is at the heart of the instrumentalist theory. (147)

[2]urely instrumentally rational agents cannot reason themselves into being rule followers” (146) any more than beings without any desires or ends could reason themselves into having certain desires or ends. But, fortunately, desires and ends are bestowed upon us. And in parallel fashion, “What reason cannot achieve on its own, cultural (and biological) evolution has: normal humans have evolved into social creatures who care about following moral rules. (147)

[3]n evolutionary account of why we care about morality, which shows how a certain practice fulfills a social function... can show how certain ways of thinking have arisen when we could not, via instrumental rationality, reason our way to those ways of thinking. (187)

Gaus shares with the instrumentalist the view that we must always reason (about what rules we will adopt, about what actions those rules require) from the inside—ultimately from our existing store of evaluative standards. But he differs from the instrumentalist by including rules (or caring about rules) among those standards.

Gaus does not take a reasonable agent’s concern for rules to be absolute and he provides an extended discussion of how agents (rationally?) weigh values and ends against commitments to rules. (148–162) However, I suspect that, if goal-pursuit and rule-following can be as readily balanced as Gaus suggests, then the deontic character of those rules will be undermined or at least those rules will be rendered insufficiently stringent to play their authoritative role. A related worry is that, because of the centrality of agent’s caring about rule-compliance within Gaus’ own view, a criticism that Gaus offers of the instrumentalist stance may in the end also apply to Gaus’ position. The criticism is that,

In the end, the instrumentalist only “owes himself” fidelity to the rules of morality; even if it would be better for him to owe it to others, he has no reason available to him to recognize their standing. (186)

If rules come into one’s evaluative standards by way of one’s caring about one’s compliance with them, then they may not provide the right sort of reason for rule compliance. For they may only provide reasons having to do with one’s own satisfactions and not reasons that derive from others’ status as free and equal agents.

Cultural [and biological] evolution has made (most of) us not just into rule-followers and rule-following punishers but, furthermore, into moral beings who expect or demand
ourselves and others to abide by rules that we and they have sufficient reason (respectively) to endorse and who do not expect or demand ourselves and others to abide by rules that we and they do not have sufficient reason to endorse. We—that is to say, most of us—have become inured with moral emotions that embed assessments of our own and others' compliance and defection. (Here I merely gesture to the systematic influence on The Order of Public Reason of P. T. Strawson's essay, "Freedom and Resentment.") According to Gaus, we cannot reason ourselves into being such moral agents living within a community of moral agents. However, when we find ourselves to be such beings, we have reason to live the life of such beings. Gaus endorses the view (which he ascribes to Hayek) that "our reason presupposes morality (and our caring for it) as much as it presupposes our goals." (147)

Public Justification and the Deliberative Model

We still have not really zeroed in on the public justification of a determinate set of moral rules. As we do so, I believe, various elements enter into Gaus' justificatory story that one might not have anticipated. Recall that for each individual a proposed rule must be justified on the basis of that individual's evaluative standards. Those standards include particular desires and ends that may be satisfied or promoted through that individual's rule compliance but, also, that individual's commitment to (caring for) certain moral rules. Also, we need to include a distinction between: (i) a given rule (governing a certain domain) being reasonably preferred by an individual over there being no rule (governing that domain) and (ii) a given rule being reasonably ranked by an individual higher than any other rule or no rule (for its domain). And let us not worry about whether rules should be evaluated in packages or separately with other rules being taken as given.

Gaus' general claim is that, given the vital importance to individuals of having rules for the governance of their domains of interaction, there will be more than one rule for any domain which each individual will favor, on the basis of his evaluative standards, over no rule governing that domain. However, because of the diversity of persons' evaluative standards, there will be no rule that everyone reasonably prefers over every other rule. Every rule that is reasonably ranked highest by some individual is reasonably ranked lower by some other individual. There may well be some rules ranked highly by some that others rank lower than no rule at all. However, since such a rule cannot be justified to those who rank them so low, no such rule is a real candidate for public justification. Nevertheless, there will remain a multitude of competing rules each of which is most highly ranked by some individual and better than no rule at all for other individuals. Each of those rules is like a point along a pareto frontier. All individuals reasonably prefer being at any one of those points to being at the no-rule point below the frontier. But any movement along the frontier will move some individuals to a more preferred rule by moving other individuals to a less favored rule.

Moreover, according to Gaus, there is no rational method for choosing among these eligible rules. For individuals who reasonably differ in their ranking of rules will also reasonably differ in their rankings of processes for selection among eligible rules. It follows that if the process for selection among the eligible rules must itself be publically justified, the public justification of rules will itself be impossible. The problem of rational indeterminacy goes all the way down. For Gaus, as we shall see, the solution is not to expect or require that reason have the job of selecting among these rules.
A central difference between Gauk' account of public reason and public justification and more mainstream accounts is Gauk' insistence that any attempt to achieve rational convergence on moral rules by appeal to some sort of detached and de-personalized reason assumes away the very problem that needs to be confronted.

Any attempt to simply reduce the reasons of the deliberators to a common basis seeks to solve the problem of public justification by denying its fundamental feature: our task of justifying moral rules to all occurs in a world in which people rationally disagree about the reasons they have. (276)

Such comments suggest that public justification of a social morality is a matter of identifying a modus vivendi among all individuals capable of ranking competing rules—at least among all individuals who have some disposition to be rule-followers and some appreciation of the need for authoritative rules to guide us toward mutually advantageous interaction.

Nevertheless, as Gauk lays out and utilizes his deliberative model of public justification, we see that Members of the Public have to be more united in their exemplification of moral personality and their proposals have to be more in conformity to "the conditions for a morality to be publically justified" (266) than one might have expected. "The Deliberative Model explicates the moral point of view..." (425) So, e.g., the Deliberative Model includes a constraint of "mutual intelligibility" (279) that seems to filter out much more than truly unintelligible proposals. For this constraint disallows the participation in public deliberation of "monomaniacs... such as one who cares about nothing but counting blades of grass, or his stamp collection." (281) The constraint also disallows the participation of those with "evaluative standards that disvalue the very idea of morality, value immoral acts qua immoral acts..." (280) and so on. Now Gauk seems correct to say that there is something unintelligible about persons who have these deviant standards entering into deliberations for the sake of identifying a justified social morality. Nevertheless, there seems to be a danger here that success in the public justification of a social morality is being assured by banning from the deliberative process any agent whose evaluative standards promise to thwart that success.

Gauk also advances a reversibility constraint: "a person's advocacy must not depend on her knowledge that she will only occupy specific roles or positions." (300) Suppose Alf opposes a rule that requires that those with bountiful economic resources to provide financial aid to those at the bottom of the economic ladder and that Alf opposes this rule because he is quite certain he is or will be among those with bountiful resources. So, were Alf to be or expect to be at the bottom of the ladder, he would favor this rule. Under these circumstances, Alf's rejection of the rule violates the reversibility constraint; hence, that rejection has no standing within proper public deliberation. (Interestingly, Betty's endorsing the rule because she is or expects to be on the bottom of the ladder should also disallow her endorsement of that rule.) Gauk holds that the reversibility constraint does not require that each member of the deliberating public adopt others' evaluative standards. (301) Nevertheless, the reversibility constraint does seem to require that, as public deliberators, individuals must shed those dimensions of their evaluative standards that would not obtain absent their knowledge of their own specific personal and social circumstances. I am not sure how much in the way of evaluative standards—especially divergent evaluative standards—would be left after those dimensions are shed.

Gauk deploys the Deliberative Model to identify key publically justified moral principles. Such principles, of course, merely provide a general outline for a social morality that is constituted by moral rules. For we have not identified a publically justified body of moral
rules until we have identified a reasonable convergence on particular interpretations of
abstractly justified principles. What is striking about Gaus’s case for basic moral principles
is the extent to which it relies upon a very high degree of abstraction—a degree of
abstraction that seems designed to “reduce the reasons of the deliberators to a common
basis...” (276) For, instead of consulting the varying perspectives of each deliberator,
Gaus seeks to extract justified principles from the shared abstract perspective of agency.

In a word in which the reasonable pluralism of evaluative standards is accepted as a
fact of life, an important and basic part of our self-conception is our status as
agents... The perspective of agency forces itself on us, and we are unable not to see
ourselves as agents, whose actions are properly determined by our own deliberations.
(337)

Following Stanley Benn and Alan Gewirth, Gaus argues that, seeing themselves as
agents in this way, all deliberators will (most strongly) favor a presumption in favor of
liberty that n part declares that “it is wrong to exercise one’s liberty so as to interfere with,
block, or thwart the agency of another without justification.” (341) The justification
demanded must, of course, be justification to the individual whose liberty is encroached
upon.

It is striking to see the extent to which Gaus, the champion of diversity among rea-
sonable evaluative standards, feels the need to invoke the actual (albeit historically con-
tingent) universality of “persons-as-agents” (429) in order to ground the universality of the
abstract rights on which agents have reason to converge. To some degree, this felt need to
ground abstract rights of agency may reflect a felt need to work around some of the
apparent implications of Gaus’s own “rights recognition” thesis. According to that thesis,
the relatively concrete moral rights that are constituted by publically justified moral rules
do not obtain and cannot be invoked within a given society unless those rights are actually
recognized within that society. Those moral rights will not be recognized unless the
relevant moral rules have authority; and the rules will not have authority unless they are
recognized. “[F]or a moral rule to have de jure authority—to authoritatively order our
moral relations—it must not simply be justifiable but must also in some way be effective
and acknowledged.” (426) Of course, this rights recognition thesis naturally engenders the
worry that the more a social order fails to recognize what we take to be human rights the
more that society cannot be charged with violating those rights.

Gaus seems to work around this implication of the rights recognition thesis by implicitly
holding that the rights recognition thesis does not extend to abstract rights grounded on the
values of persons-as-agents. Thus, we are told that “... a slave society [in which there is no
acknowledgment of even an abstract right to liberty] is certainly subject to deep moral
criticism as it fails to respect the abstract rights of agency." (429)

... abstract rights must be interpreted into more specific rules and requirements
before they can perform their functions of providing a framework for cooperation
among free and equal persons; but they always serve as a basis for moral criticism of
societies that fail to have any adequate... scheme to interpret these abstract rights...
In a straightforward sense, such societies fail to respect human rights and are
properly subject to censure. (429)

Indeed, we arrive at the startling pronouncement that “The morality of agency is thus
today a universal, transcendent morality: all true moralities must accommodate the basic
claims of agency.” (430)
Again following Gewirth, Gaus maintains that from the perspective of agency there is a potent argument for the public justification of rights to assistance.

Each Member of the Public, deliberating simply on the values of agency, would weigh whether some guarantee of goods and resources would have a net positive impact on her agency, given the risks encountered in social life.... [It] certainly looks plausible that some fairly strong welfare rights follow from this perspective. (359)

Still, Gaus maintains that any principle that achieves public justification at this level of abstraction must also pass a second test. This is a test of stability that requires that when we lift the veil of abstraction the principle will remain justified with respect to each “rational and reflective free and equal moral person’s full set of evaluative criteria” (336) According to Gaus, the presumption on behalf of liberty that is based upon the values of agency survives this subsequent test of stability while only a modest principle of required assistance, viz., one that requires assistance to those greatly in need through no fault of their own and at little cost to those supplying the assistance, survives the stability test.

Although I like Gaus’ conclusions here, I do not see why an uncompromised principle of liberty survives the lifting of the veil of abstraction while only a very compromised principle of assistance survives. The primary consideration that Gaus mentions that requires a major dilution of the principle of assistance is that, when the veil lifts, some people take note of their reasonable belief that only people who deserve assistance may morally demand it. (363) That reasonable belief of some people insures that any principle that requires assistance to the undeserving will fail the stability test. But, if so, why not similarly think that when the veil of abstraction is lifted some people will take note of their reasonable belief that people’s claims to liberty are to be honored only if those people deserve liberty? And, why not similarly think that this reasonable belief that liberty must be deserved has the consequence that any principle that requires that liberty be accorded to the undeserving fails the stability test?

Gaus offers a third highly important deliverance of public deliberation operating at this high level of abstraction. This is the reasonable convergence of all deliberators on the propriety of an extensive structure of strong jurisdictional rights. These are rights—quintessentially property rights—held by individuals to do as they each respectively see fit with some portion of the world. The deliberators do not all rank any one specification of jurisdictional rights higher than any other specification. But they all rank there being some highly articulated structure of individual jurisdictional rights over the absence of such a structure. For what all reasonable deliberators see is that there can be no determinate social ranking concerning the disposition of this or that particular portion of the world. In effect, those seeking public justification recognize the limits of public justification and accommodate themselves to it by endorsing a system in which a vast array of more concrete decisions about the disposition of resources will not require public justification.

If we partition the moral space in this way, for each and every person there is some part of the moral space over which her evaluative standards have public standing. In that part of the moral space controlled by a person, her evaluative standards are sovereign, and others must respect those standards in that space. (372-3)

Public reason seems to call for a structure in which what is to be done with at least most of the world is not itself to be determined by public reason. This is a nice case of public reason recognizing its own radical limitations.

I think that there is a powerful argument here from the difficulty of achieving rational collective decisions about the deployment of resources to the need to depoliticize such
decisions to the need to recognize or institute extensive jurisdictional rights over those resources. And perhaps this reasoning would be endorsed by all from the perspective agency. However, as in the case of the abstract right to liberty, I am not at all sure that justificator at this level of abstraction will survive the further test of stability that Gaus insists upon. For, when individuals are allowed to consult their respective full and divergent evaluative standards, it seems likely that reasonable individuals who attach very high value to comradely collective decision-making will strongly prefer jurisdictional rights that are markedly less strong and extensive over the robust commitment to jurisdictional rights that is endorsed at the level of agency. (They will be willing to risk non-rational or inconsistent collective decisions in order to preserve more opportunity for joint decision and joint action.) It seems that this reasonable preference of some individuals is as apt to upset the apple cart of strong and extensive jurisdictional rights at the testing for stability stage as some people’s reasonable opposition to required assistance to the undeserving is apt to upset the apple cart of strong and extensive rights to assistance at the testing for stability stage.

I also think that Gaus somewhat misstates his own conclusion on behalf of strong and extensive jurisdictional rights when he says that, with respect to her allotted moral space, Betty’s evaluative standards have public standing. For this suggests that Betty’s right to dispose of that which is within her jurisdiction is limited to dispositions that accord with her own evaluative standards. It suggests that Betty’s right does not extend to using of her property in ways that are uncalled for by her evaluative standards. But surely the immunity that jurisdictional rights provide is supposed to extend to such uncalled for uses. Nor does the jurisdictional solution require that others respect Betty’s evaluative standards—at least in the sense of their finding those standards at all attractive. If the recognition of jurisdictional rights requires respect for the potential right-holder’s evaluative standards, the very problem that jurisdictional rights are supposed to help us circumvent will block convergence on the jurisdictional rights solution.

Saved by Contingency (and the State)

The reasonable public deliberation of moral agents gets us to certain general guidelines for social morality—that it should encompass a strong abstract right against coercion, a modest abstract right to assistance, and a claim to some extensive system of strong jurisdictional rights. However, each of these abstract rights or principles are subject to many competing interpretations and reasonable agents will differ about which of these interpretations are best endorsed and internalized. And, as we have already noted, according to Gaus, reason cannot provide overall social rankings for these competing interpretations. However, contingency comes to the rescue.

Recall that we are not rule-followers because we have reasoned ourselves into being rule-followers. Rather there has been a (cultural or biological) evolutionary selection of rule-following individuals because rule-following individuals are cooperative and cooperative individuals and societies inhabited by cooperative individuals are more fit individuals and societies. Not reason, but rather an invisible hand process accounts for our being rule-followers. Similarly, in our diverse actual social circumstances, particular moral rules arise not because we reason our way to them but, rather, through invisible hand adjustment to local contingencies. The main mechanism of this equilibrating process is “the increasing returns of coordinating on a common understanding of moral requirements.” (398)
The idea is that the more people with whom one might engage in mutual beneficial interaction favor one particular rule for governing that sort of interaction, the more one has additional reason to interact with prospect cooperators in accordance with that particular rule. If one of the rules that each finds more attractive than no rule at all is already (as a matter of mere historical contingency) more followed than its competitors or even has some sort of salience that makes it more likely to be more followed, individuals will tend to migrate to that rule to enhance their respective prospects of valued cooperation. The more this sort of migration occurs, the more individuals likely to interact with one another will converge on that particular rule. "[W]hen engaging in collective justification about a common framework for living, we have reason to endorse common rules even when they do not align with our convictions about what is optimal." (502-3) Through such a process and without any imprimatur supplied by reason that particular rule emerges as (almost) everyone’s most highly ranked rule. As an unintended result, a moral equilibrium is attained. Gaus especially emphasizes that no party is

... induced by some external consideration to conform to a requirement that is not, from his or her perspective, optimal: consulting simply his or her own evaluative standards, each has decisive reason to freely endorse whichever moral requirement they have coordinated on. (394, emphasis in original)

Gaus considers and rejects the criticism that such an arational process fails to select fairly among the contending and eligible rules. His claim is not that the process is fair but, rather, that the demand for fairness has no force in this context because the selection of particular rules is not a matter of distributing commonly held resources. "Distributive justice is part of morality; moral justification, however, is not itself a case of distributive justice." (409)

Unfortunately, it seems that invisible hand selection of determinate rules must sometimes give way to or be supplemented by visible fist selection or even creation of rules. "We appeal to the state to provide definite interpretations of our moral principles and rules when social evolution alone cannot perform the task." (475) Sometimes an invisible hand process will select a rule that would be reasonably ranked below no rule by some individuals except for others’ convergence on it. Such a rule will constitute a stable social convention but not a publically justified one. Political authority may then be needed to shift agents toward justified terms of co-ordination. More strikingly, Gaus thinks that often state authority is needed to create determinate rules and rights more or less out of whole cloth. For instance, the state may need to provide "detailed and complex legislation about property rights in financial instruments, which involve banking and financial regulations." (466) "In the absence of the recognition of the state’s authority to articulate and interpret our rights, many of our complex rights are indeterminate." (466) (It is a bit odd that Gaus turns immediately to authoritative legislation and does not consider at all the judicial articulation of increasingly complex rules—even though theorists like Hayek have focused on judicially articulated rules and rights as a crucial invisible hand-like source of law.)

According to Gaus, then, all Members of the Public have sufficient reason to affirm the state’s authority to select or create determinate rules and rights—as long as those selections or creations are "within the range of reasonable developments of the rights." (467) To affirm this constrained authority is not, of course, to ignore the fact that

...the political process is a deeply imperfect way to arrive at equilibrium, as it can so easily miss the mark, and move us from a current equilibrium to a moral
disequilibrium that, because it is backed by coercive punishment, can be a stable social equilibrium. (460)

However, it may be a problem for Gaus that some reasonable people think that the core function—or at least consequence—of belief in state authority is the generation and reinforcement of such moral disequilibria. If that belief is reasonable, does it follow that state authority cannot be publically justified?

Perhaps the public justification of the state's role in moral equilibration can be rescued by dropping Gaus' contention that this role requires state authority. For it is not clear that the state needs to have authority in order to nudge reasonable individuals toward compliance with particular determinate rules or rights. Suppose the state simply credibly announces that it will enforce a particular rule (within the reasonable range) about what constitutes establishing a property right in sub-surface minerals. An individual with an interest in who has property in sub-surface minerals will then have to adjust his own conduct to this fact in very much the same way that an individual will have to adjust his conduct to the fact that other individuals are converging (absent any state decree) on a particular rule that she herself does not especially favor. Since the reasonableness of the adjustment in the latter sort of case does not require any recognition of authority in the converging individuals, it seems that the reasonableness of adjustment in the former case (in which the state announces which rule it will enforce) also does not require any recognition of authority in the state.

I will not attempt here to spell out the complex structure of considerations and counter-considerations by which Gaus triangulates toward (but does not arrive at) determinate political philosophical conclusions. It has to suffice to say that the public justification of a strong abstract right against being subject to coercion and a strong abstract claim to an extensive structure of private property rights, and the presence among Members of the Public of some individuals who reasonably take state interventionist measures to be highly coercive tilts Gaussian public justification toward moderate classical liberal small (but not at all minimal) state conclusions.

On the Status of Our Standing as Free and Equal Persons

In a number of ways The Order of Public Reason raises questions about the status of our standing as free and equal persons. Many passages in The Order of Public Reason suggest that the starting-point for this work is the proposition that it is wrong for one individual to behave in an authoritarian manner toward another. Furthermore, what makes it wrong for Alf to get Betty to perform $P$ by authoritarian means, i.e., by moral intimidation or physical coercion, is that Betty is a free and equal moral person. Agents who transact with others in an authoritarian manner “do not respect the moral equality of their fellows.” (xvi) Their conduct cannot be reconciled with “our status as free and equal moral persons.” (xv) Gaus tells us that his conception of a publically justified authoritative social morality “seeks to respect the status of all as free and equal moral persons.” (14-5) To respect another as a free and equal moral person is “to acknowledge that her reason is the judge of the demands morality makes on her.” (15) And to acknowledge that her reason is the judge of the demands made upon her is to acknowledge that those demands have authority—are not merely authoritarian—if and only if she has sufficient reason (on the basis of her own evaluative standards) to comply with those demands. “We begin by supposing that free and
equal persons have no authority over each other, and so it is authority that must be
justified.” (220)

Those claiming the status of free and equal persons, resisting their subordination to
the unjustified authority of others, have a call on us: they demand only what we
suppose is our own due as moral persons—to be guided by one’s own reasoning and
understanding of the normative world. (433)

Thus, it seems, our status as free and equal persons is the reason that all the demands of
morality must be publically justified. Those who make demands that cannot be justified to
the subjects of those demands act in defiance of this reason. We can call this the “external”
construal of free and equal personhood.

Gaus acknowledges that it sounds as though “[o]ur initial assumption” is “that we
confront others as free and equal persons” and that this starting-point is “an exogenous
(external) demand on an acceptable social morality based on some foundational moral
intuition...” (223) However, according to Gaus, that we confront others as free and equal
persons is actually “a deep presumption of our social morality with rational reactive
attitudes.” (223)

[The Basic Principle of Public Justification [which requires that individuals have
sufficient reason to endorse any rule under which authority is asserted over them] is
not an ideal imposed upon morality by a philosophical commitment to the idea that
moral agents are free and equal but is itself grounded in our reflective understanding
of a bona fide social morality—one in which the moral emotions are well grounded
and for which it is appropriate to feel guilt for violations. (263)

We can call this the “internal” construal of our status as free and equal persons.

We are not to start our account of social morality from outside the circle of moral life
with foundational judgments about what the basic normatively significant features of
persons are and about what basic principles for the governance of our interactions are
grounded on those features. Rather, we are to start with features internal to the circle of our
moral life—most especially, our moral emotions, e.g., our resentment when we are sub-
jected to demands that cannot be justified to us and our indignation when others are
subjected to demands that cannot be justified to them. We do as well as we have to—and,
perhaps, as well as we can—by beginning with the sense we or at least many of us have of
individuals as free and equal persons—a sense that is “a deep presumption of our social
morality with rational reactive attitudes.” (223) We cannot start outside the circle of moral
life and detect reason to step inside because “our reason presupposes morality (and our
caring for it)” (147)—though, of course, we can be inducted into moral life.

This internalization of reason affects the scope of the authority of morality and also, I
think, the character of that authority. Morality does not have authority over agents who
have not entered the circle of morality. How much of a problem this is for Gaus depends on
precisely how one is to determine who is inside of and who is outside of moral life and how
many agents then turn out to be outside. I am not confident about how Gaus would have us
make this determination. That is, I am not sure what elements have to be present (and how
deeply and how consistently) within an agent’s evaluative standards for moral authority to
have a grip on that agent. Gaus holds that psychopaths are outside and for that reason they
are not really subject to moral condemnation—albeit we have plenty of prudential reason
to defend ourselves against them. Still, Gaus’ view has to allow us to morally condemn
a good number of agents who treat others harshly in ways that are not justified to the
recipients of those treatments. Such condemnation is, after all, one of our “rational reactive

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attitudes." And such condemnation is important for morality to fulfill its function of channeling us toward cooperative interaction.

As I understand it, for Betty to be subject to moral condemnation for conduct toward others that cannot be justified to them Betty has to be enough within the circle of moral life that she experiences herself and others to be free and equal persons. That is, for Betty's bad behavior to be wrong her overall evaluative perspective must include or have as an implication the unacceptability of treating agents in ways that cannot be justified to them. My supposition here is that, for Gaus, the meta-rule that condemns treating others in ways that cannot be justified to them itself can only be justified to Betty by its being in accord with her goals, aspirations, and cared for commitments—since the meta-rule cannot be justified as an exogenous philosophical ideal. However, if this is correct, then the wrongness of Betty's conduct resides in the divergence between her conduct and her evaluative standards rather than a divergence between her conduct and other's standing as free and equal persons. It is her evaluative standards that have authority over her rather than others' status as free and equal beings. Respect for others as free and equal persons may devolve into respect for one's own evaluative standards.

Gaus' powerful reply to this sort of criticism would, I think, be that it reflects a stubborn refusal to appreciate that public reason and justification must proceed endogenously; for the point of public reason and justification is to reveal to people the reasons they have (if they have them) to endorse and internalize certain rules; the point is not to complete a philosophical disquisition on moral truth. Perhaps only a radiant moral truth would rationally compel those outside of the moral circle to enter into it. But a focus on those outside distracts us from the remarkable fact that here we are—at least many of us—inside a structure of rules that makes possible enormously mutually beneficial social interaction, does so through the authoritative character of those rules, and yet is compatible with our autonomy.