

HAVING A REASON AND DISTRIBUTIVE JUSTICE IN *THE ORDER OF PUBLIC REASON*

ELVIO BACCARINI
University of Rijeka

ABSTRACT

In the first part of the paper, Gaus' ground for the ideal of persons as free and equal is described. Doubts are raised about the appropriateness of the use of his account of this ideal as endogenous to our moral practice. The worries are related to the use of the concept of having a reason that Gaus makes in his book, as well as to the aptness of his account of our moral practice from the viewpoint of our moral phenomenology. Some doubts are raised in relation to the pertinence of Gaus' concept of having a reason from the perspective of the motivation of the public reason project.

In the second part of the paper, a summary is offered of Gaus' model of public justification and some of its consequences are discussed. The primary intention here is to show that, contrary to Gaus' view, egalitarian liberalism, and not classical liberalism, is the most appropriate result of such a model of justification.

Keywords: Gaus, having a reason, justification, liberalism, public reason

Gerald Gaus' *The Order of Public Reason* is a monumental work and a masterpiece of moral and political philosophy. It is an enormous pleasure and a privilege to have the possibility to discuss it with the author. As is usual in philosophical discussions, I will remark the points that raise some doubts to me.

At the beginning of the paper, I describe Gaus' ground for the ideal of persons as free and equal. I raise some doubts about the appropriateness of the use of his account of this ideal as endogenous to our moral practice. The worries are related to the use of the concept of having a reason that Gaus makes in his book, as well as to the aptness of his account of our moral practice from the viewpoint of our moral phenomenology. Some doubts are raised in relation to the pertinence of Gaus' concept of having a reason from the perspective of the motivation of the public reason project.

In the second part of the paper, I offer a summary of Gaus' model of public justification and I discuss some of its consequences. My primary intention here is to show that, contrary to Gaus' view, egalitarian liberalism, and not classical liberalism, is the most appropriate result of such a model of justification.

1.1.

The pivotal moment in Gaus' book is represented by the statement that the acceptance of others as free and equal is an endogenous commitment of our morality (Gaus 2011, 223). In other words, this is not a commitment that derives from a controversial philosophical argument or a sectarian viewpoint. We are committed to it simply by the moral practice in which we are engaged. How does Gaus show this?

Gaus says that, although morality performs a function, an account based merely on instrumental rationality is not sufficient to explain it (Gaus 2011, 53-258). Morality must be explained together with the explanation of our caring for a moral rule even when it does not promote our wants, ends, or goals. Caring for a moral rule includes punishing others, when they disrespect it. Central for the explanation of this caring are reactive moral emotions, i.e. resentment, indignation and blame, emotions that we express to others when they do not respond to moral requirements, as well as guilt, which we feel when we do not respond to moral requirements. This is the first step of Gaus' argument: (i) endorsing a moral requirement implies endorsing emotional reactive attitudes toward the disrespecting of it (blame, indignation, etc.).

We appropriately have a reactive moral emotion toward a person who does not respond to a moral requirement only if the moral prescription is appropriately addressed to her. Gaus explains this with (ii) "*The Principle of Moral Autonomy*. A moral prescription is appropriately addressed to Betty only if she is capable of caring for a moral rule even when it does not promote her wants, ends, or goals and she has sufficient reasons to endorse the relevant rule" (Gaus 2011, 222). This principle represents the second step in Gaus' argument. This is the main ground for the acceptance of others as free and equal as an endogenous commitment of our morality. It is important to remark what is exactly a free and moral person for Gaus: "She is a free moral person as she can be guided by her own sense of obligation based on her own reasons; she is equal because her reasons are as definitive about what she can recognize as her obligations as mine are about what I can see as mine" (Gaus 2011, 223). An important part of Gaus' argument is represented by (iii) having a reason is defined internalistically.

The central notion of a free and equal person does not commit Gaus to a substantial interpretation of equality, i.e. to a form of egalitarian liberalism. On the contrary, he defends a form of small state classical liberalism. I will try to show that the commitments of public justification are more properly related to a support to some forms of egalitarian liberalism. But before this, I discuss the crucial steps of Gaus' argument shown until now.

Gaus takes (i) as a fact of our moral practice. (ii) and its link to the ideal of free and equal persons is related to the acceptance of (i). Namely, it is not part of our moral practices to address moral reactive emotions to people who are unable to interiorize moral requirements, or do not have sufficient reasons to do so.

But (ii) is related to (iii) — having a reason is interpreted internalistically, as well. Precisely the thesis of (iii) is that one has a reason when she has a reason accessible to

her under respectable reasoning. The internalistic conception of having a reason is one of the foundations of the ideal of persons as free and equal.

It is important to remark that a person does not have a reason in the sense that the reason that she has is the reason that, in a particular moment, she thinks that she has, or that she accepts as her reason. A person does not have a reason if there is a defeater easily accessible to her for what she takes as her reason. A person does not have a sufficient reason even if she takes in consideration the defeater and reacts properly, but neglects an equally accessible defeater of the defeater, or a slightly more difficultly accessible defeater of the defeater. But where can a person legitimately stop? The danger is that we collapse in the requirements of full rationality. In order to avoid this, Gaus establishes the criterion of respectable amount of reasoning in our morality as the reasoning of a normal conscientious person. There are people more engaged in moral reasoning. They are engaged in more than respectable reasoning. Because of the fact that moral reasoning is a social activity, they can transmit their higher achievements to other people, who do not need to be able to reproduce their steps in reasoning. Sometimes the most other people can achieve is to have reasons to trust them. So, a person can have sufficient reasons because she has been engaged in more than respectable reasoning, or because she profits from those that have been engaged in more than respectable reasoning, or because she has been engaged in respectable reasoning. To be sure, there is no absolute obligation for a person to endorse the results of the reasoning of experts. It is reasonable for a person to endorse this only if she has reasons to trust them. Generally, says Gaus, there is no problem here, because epistemic practices in general function as social enterprises, with a proper role for experts.

1.2.

The account that Gaus offers does not correspond to a reflection on our moral practice, but to a controversial philosophical position, if, among other, it includes an ambiguous¹ or contested conception of having a reason, because this conception plays a crucial role in the account. Another possible reason to worry about Gaus' intention to offer a reflection on our moral practice, as opposed to a controversial philosophical position, appears if the reflection does not correspond to our moral phenomenology. I will indicate some doubts related to both points. Before proceeding, I remark that for Gaus it is of crucial importance to establish the ideal of free and equal persons and its consequence for the justification of social morality as endogenous to our moral practice, in order to avoid the charge of sectarianism.²

One of the issues with Gaus' conception of having a reason is that it is related to a questionable level of idealization. As we have already seen, a person does not have sufficient reason if there is a defeater for the reason available to the person after a respectable amount of reasoning. Recall that Gaus can make a use of this epistemic view of having a reason that leads to sensible departures from the reasons that people

1 Enoch directs to Gaus the charge of equivocation (Enoch forthcoming, section *Having a Reason (and How Gaus Gives Away the Game When It Comes to Absolute Morality)*).

2 David Enoch directs to Gaus, as well as to the whole public reason project, the charge of sectarianism (Enoch forthcoming, sections *Self-Defeat* and *A Concluding Thought about the False Modesty of Public Reason*).

actually endorse. For example, there may be the case of Alf who, in virtue of a neurosis, does not verify a possible defeater of the reason that she endorses. Idealized Alf, nonetheless, takes in consideration this defeater and, as a consequence, the reason endorsed by the real world Alf is not a reason that he has. As Gaus says, “if idealized Alf examined Alf’s presently affirmed set of reasons and concludes that some of these are bad reasons (say, his reliance on political ideology to decide what philosophical doctrines to accept), then actual Alf does not have the reasons he affirms because they would not be affirmed by idealized Alf” (Gaus 2011, 237). But in general, Gaus is ready to support the authority of actual people to affirm the reasons that they take as their reasons (Gaus 1996, 150-151). Moreover, this is what constitutes the essence of liberalism, contrary to sectarianism (Gaus 2012). But now the worry appears that it is not clear what can be the appropriate level of idealization. It may be possible to say that by admitting some level of idealization, Gaus opens the door “to further idealization, which may result in imputing beliefs and epistemic practices to them they do not have, which they may not recognize, and which could not therefore explain their beliefs and actions. [...] Someone [...] could get a Ph.D. in political theory and believe whatever it is that any particular theorist believes or read all the books his interlocutors have. He could come to see his beliefs in God or the free market or a socialist society as childish fantasy if given sufficient time and exposure to cogent arguments. If this is the terrain of the debate, then the point of the recourse to internalism, to tie moral and political justification to actual people, is largely lost. Rather, theorists should just argue about what people ought to believe by showing what reasons there are” (Moon 2011).

There are philosophers who avoid this problem, because their thesis is that the right level of idealization is that of full rationality, and for them this idea is related to externalism about reasons. Such is the position of Stephen Wall (Wall 2010, 133-136), for whom full rationality means, among else, “awareness and appreciation of the full range of evaluative considerations that apply to the situation at hand” (Wall 2010, 134). The externalist idea of full rationality is endorsed by Richard Arneson, as well: “If I am below the threshold acceptable level, then when you impose on me on the basis of moral principles I do not accept, the thing to say to me is that you are not treating me wrongly or disrespectfully. You are treating me according to principles I would accept if I were fully rational. But this is the correct response to *anyone* who is less than fully reasonable and rational. [...] Reasonable and rational people when fully informed will not disagree” (Arneson 2011).

One of the main grounds for the philosophical refusal of the idea of full rationality endorsed by these authors is that it is not practicable because even agents with magnificent epistemic capacities will not converge on the same beliefs. For convergence it is required that “either (i) they initially believe precisely the same things and had precisely the same values, ends, goals, and so on, or (ii) what they initially believed had no effect on their final set of beliefs” (Gaus 2011, 239). The first possibility is hardly possible. As concerns the second possibility, Gaus says that convergence is not to be expected, because since every person starts from where she is, her initial beliefs have a privileged position. These beliefs, for every agent, influence the content of the set of beliefs justified in every further step. Moreover, it is also relevant that every agent will shape different coherent sets of beliefs depending on when they start their belief

revisions: “depending on the order in which the choice is made, full rationality may lead to a variety of outcomes” (Gaus 2011, 243).

My worry is about whether we have here a not controversial epistemology. One of the possible replies consists in socializing epistemology, as has been done in some epistemological proposals of high reputation. I think about cases when persons interact and, therefore, influence each other, which can favor convergence. Keith Lehrer, for example, has shown that convergence is possible if interaction is sufficiently iterated and if persons attribute to each other a reliability higher than 0 (Lehrer and Wagner 1981). A different strategy is indicated by Philip Kitcher. Convergence, in his view, is possible because of the influence of the growth of evidence. In his opinion, scientific theories depend on values that we endorse, not only epistemic values, but moral and other values, as well. As a consequence, the endorsement of a scientific theory is influenced by, for example, the endorsement of a religious theory. It may appear that such a view strongly supports the denial of the possibility of convergence. But the growth of evidence can show that the only reason to refuse a scientific theory may be the protection of the religious theory. In such a case, the increase of evidence pushes for the revision of the religious doctrine (or any other system of beliefs from which one starts) and important steps are made in the direction of convergence (Kitcher 2011). Finally, I indicate the example of an epistemologist who remarks the importance of formative experience. Michael DePaul says that looking for coherence, with the strategy of saving the most of initial beliefs, is only one of the possible epistemological strategies. Radical revisions are possible as well. In particular, such radical revisions are welcome if they are the result of formative experience, of the refinement of the capacity to form beliefs or judgments. Obviously, there is no guarantee that convergence will be obtained, but it can be obtained despite the fact that different persons start from different sets of beliefs, if they have enough common experiences (DePaul 1993). In any case, in DePaul’s proposal, the initial set of beliefs does not have such a decisive role, like in Gaus’ view. My claim is not that these proposals are the best epistemological proposals, but that they appear as intelligible and reasonable proposals that support the idea of convergence. Perhaps they are not in the same strand of the idea of full rationality seen above, but they are supports to the idea of external reasons and growing of convergence, at least in contrast to Gaus’ view that appeals to the crucial role of initial beliefs.

A version of externalism that does not employ the idea of full rationality appears to be that of Mack. Even if the epistemological proposals that I have indicated were unable to support the full rationality view, they may be a good support to Mack’s more moderate view. As he says, “Why does Gaus think that expressing to Betty a reason for Betty to desist is merely talking at Betty and not to her? I think the answer is that Gaus does not think that anyone can ever be given (presented with) a reason. Or more precisely, a person cannot be given (or presented with) a reason she does not already have. Betty cannot be given a reason in the sense of having her attention drawn to a consideration on behalf of or against an action that is not already among her evaluative considerations. [...] My contrary view is that people can be presented with reasons which are not already residing within their evaluative considerations; contrary to Gaus, deliberation includes judging whether to bring into one’s motivational structure a consideration which is not already there. [...] That is why I see presenting Betty with

a reason for her desisting—which reason she does not at that point have (in Gaus’ sense)—as an instance of addressing her and not merely talking at her.” (Mack 2011).

Gaus can offer answers to both lines, the full rationality, as well as the more moderate view of Mack. As he could say, there is nothing bad in trying to improve the reasons people have, in order to try to obtain convergence on more developed reasons. But everything that he says about illegitimacy of coercion still remains in the cases that persist in resisting convergence and as far as they do so. Still, a problem of instability persists for Gaus in virtue of his concept of having a reason that admits some idealization. It is still unclear how much reasoning can we demand in order to recognize that one has satisfied the requirement of respectable reasoning.

A kind of challenge directed to Gaus is that the idealization that he introduces is the source of authoritarianism. It is exactly avoiding authoritarianism that Gaus sees as one of the main advantages of his proposal. As he says, it is one thing to say that one’s reasons are those that best fit with what else she believes, and she would recognize these reasons after respectable reasoning (which is the level of idealization supported by Gaus), but still another thing to arrive at the level of epistemic perfection required by the external reasons view. It is only the latter requirement that is authoritarian. But when one (Betty) says to another one (Alf) that he would realize that he has a reason because he would realize this if he considered a defeater accessible to him, isn’t this a form of authoritarianism? Isn’t Betty imposing her view to Alf? Gaus answers to this problem: “When another demands that you comply with a rule she is demanding that you do what you have sufficient reasons to do; she is appealing to your rational nature, not demanding that you put it aside. She must be saying: “you have reasons to comply that you are ignoring. My demand is not simply that you live as I see fit, but as you would see fit if you adequately employed your reason”” (Gaus 2011, 263). So, Gaus would say, it is a different case if Betty says to Alf “You must do ϕ because this is the right thing to do!” or if she says “You must do ϕ because this is the right thing to do as it follows from your evaluative standard $\Sigma!$ ”. But what if Alf refuses this? It is quite a natural reaction of some communities (for example, religious) to feel insulted exactly because external people want to impose on them conclusions about what follows from their evaluative standards. At the end of the day, Enoch says, the insult is that of not having dedicated respectable reasoning to what a person herself takes as of being of value (Enoch forthcoming, section *Idealizing, and Excluding the Unreasonable*).

On the same line, although with less vehemence, it may appear that the level of idealization that Gaus introduces can be a ground to charge his proposal of being an unlikely public justification theory, if the core intention of public justification is to reconcile the exercise of liberal authority with the citizens’ will, which is obtained by establishing principles on which citizens must be able to voluntarily act. In virtue of the epistemic gap between epistemically idealized agents and real agents that Gaus establishes, constituted by his account based on accessible and not actual reasons, his proposal is devoid of voluntarism and takes the side of correctness-based account of justification. Namely, it is to be expected that an agent can be unable to voluntarily act on a reason that he does not actually embrace, although the reason may be accessible

to her after more reasoning.³

The objections of authoritarianism, as well as that of de-voluntarisation, depend on the issue of Betty's epistemic authority over Alf. Here it must be said that Gaus is cautious. As he says, in order to override Alf's epistemic authority over the reasons that he has, Betty must have a particularly strong case. Precisely, she must base her claim beyond a reasonable doubt (Gaus 1996, 150-151). But this is rather improbable on every interesting moral matter. As Gaus says, "because matters are so complex, neither side can typically claim victory" (Gaus 1996, 154). This is exactly the original teaching of burdens of judgment.

The question, now, is whether for Gaus it would be better to renounce the epistemic idealization, after all. The motivation for idealization is related to the avoidance of what Gaus defines as Populist Theory of Justification instantiated by the Actual Assent Thesis. According to this thesis, Betty can impose a demand on Alf only if she obtains his assent. Gaus dismisses this thesis: "People can withhold their assent because of obstinacy, selfishness, laziness, perversity, or confusion" (Gaus 1996, 131).

Gaus discusses a less populist version of Justificatory Populism that admits that sometimes Betty's demand is justified even if Alf dissents. The requirement is that Alf deliberates in good faith and doing his best to reason. This is called Reasonable People Thesis. The core aspect of the thesis that Gaus discusses is that reasonable people rely only on methods of reasoning that are accessible to others, precisely on commonsense reasoning and conclusions of science when they are not controversial. However, as Gaus remarks, commonsense reasoning includes a lot of fallacies and heuristics, and therefore leads to normatively inappropriate results. Gaus' alternative is to appeal to a minimalist theory of reasoning, by which we can identify the reasons of people as reasons to which they are committed by their own system of beliefs and reasons (Gaus 1996, 130-136).

With this, however, we may appear to be back to the charges of anti-voluntarism and of authoritarianism. But don't forget that Gaus says that each agent has an almost absolute authority over her reasons. Only in exceptional cases can Alf and Betty claim epistemic authority over each other. Are we, by this, back to something very close to the Actual Assent Thesis?

This would not seem to me as a bad result. After all, as we will see in the next parts of the paper, *The Order of Public Reason* has powerful resources to exclude some personal demands from public justification. Other agents can exclude from the eligible set of rules Alf's proposal of rule if it is ineligible for them. They must be careful in doing so, because this would imply that they do not have a moral relation with him, which means that they cannot direct authoritative moral requirements to him. But they have blameless liberty toward him. So, there is a price for Alf, as well. This is the reason why Alf must be very careful when he insists with requirements that are ineligible for

³ The objection is inspired by Enzo Rossi (Rossi forthcoming). The difference between Rossi's formulation and the one that I offer here is represented by the fact that he affirms the voluntaristic problem as related to an agent who is unable to accept a reason even despite seeing that it is a reason for her.

others.

At the end of the day, it may appear that it is not worth it to employ energy to establish when a person is reasonable in relation to her reasons. Instead it is more worth-deserving to try to define her reasonableness in her interaction with others. Perhaps this is not a welcome outcome for Gaus, because it pushes in the direction of public reason as related to the Rawlsian idea focused on reciprocity between free and equal agents, as opposed to what may be Gaus' conception of autonomy focused on reasonableness in relation to subjects' reasons (cfr. Rossi forthcoming; Quong forthcoming).

At the really end of this part of the discussion, it appears the issue about whether sometimes it is not possible to avoid forms of strong externalism. I refer, for example, to the case of religious parents who refuse medical support for their child and let her die. According to the selection for the eligible set of moral rules (that I explain below), some parents can prefer no social regulation at all of parents' duties and of the limits of their rights toward children than a regulation that limits parents' religious or cultural freedom in these matters. But, even for many liberals this is totally unacceptable. J.S. Mill, as he shows in the fifth chapter of *On Liberty*, is a prominent example (Mill 1859/1977, 301-304). It seems to me that there is an interesting question for Gaus about the issue of parents' rights and duties toward their children. Whose freedom must be protected? The freedom of parents? The freedom of civil servants? Do interests of children prevail? But who establishes what the interests of children are? The issue here is about who has the jurisdictional right in the education of children.⁴

1.3.

I go now to a further challenge that may be directed to Gaus' discussion intended to found freedom and equality on the base of a reflection on our moral practice. This reflection, as Gaus says, reveals that we direct reactive emotions only to agents that have a sufficient reason for endorsing a moral prescription, while 'having a reason' is intended as 'having a reason accessible to the agent' — otherwise, a reactive moral emotion is not appropriate.

It seems implausible to take Gaus' internalism as a credible account of our moral practice if it importantly diverges from our moral phenomenology. Certainly, there are relevant counterexamples to strong externalism coming from moral phenomenology. It is implausible to blame a person who lived in Athens in the fifth century BC for accepting slave ownership. But there appear to be counterexamples to Gaus' account, as well. Certainly we blame and feel indignation for Goebbels, although it does not appear how our moral reasons could possibly enter in his evaluative standards. We blame and feel indignation for his wife for having killed their children, although this may perfectly follow from her evaluative standards. I am tempted to say that we blame religious parents who withhold medical treatment and let their child die because she did not receive medical support. This situation may be dubious. In a famous case, there was a difference between the attitude toward the father (who had no doubts about the right option to take in this situation) and the mother who had some doubts. This

⁴ I thank Ivan Cerovac for the discussion of his point.

seems to confirm Gaus' view that blame is directed only to the person for whom it was possible to access a moral reason (in this case, the sufficient reason to offer medical support to the child). But endorsing such a criterion opens the door to some surprising results. For example, we would have to direct more blame and feel stronger indignation for Eichmann (who declared that he had some awareness of the monstrosity of Nazism; or at least it appears that such awareness was available to him) than for Goebbels (who was totally convinced in any single moment about the Nazi project). We would have to feel stronger blame, indignation and resentment for a neo-Nazi who beats members of ethnic or racial minorities in his suburb, than for Goebbels.⁵ This appears so strongly counterintuitive and distant from our moral phenomenology that it needs to be explained.

It seems that we have various reactive attitudes in relation to different types of cases. On one hand, there is the absence of reactive attitudes in relation to subjects who cannot interiorize moral rules, like children and psychopaths. I do not see at this point problems for Gaus' proposal from the standpoint of moral phenomenology. There are, on the other hand, challenges for Gaus from cases where the issue is that of having a reason. It appears as part of our moral phenomenology to direct reactive attitudes even in cases when it seems that people do not have sufficient reasons in Gaus' sense, like the Nazi. But here subtle explanations and classifications are needed. An explanation is needed both for why we do not feel indignation and blame for 5th century Athenians, as well as for why we feel it for contemporary Nazi and 19th century slave owners in the Dixieland. I am not able to give an answer now, but the relevant fact is that looking to the phenomenology of reactive emotions, and reactions of criticism that we have, it may be that neither strong externalism, nor the internalism that Gaus supports are able to completely cover the phenomenology and, consequently, explain our moral practice. It seems that a satisfactory explanation still needs to be offered.⁶

This discussion indicates that the Principle of Moral Autonomy and its establishing freedom and equality as endogenous to our engagement in morality may be controversial if we discuss the crucial notion of having a reason, and if we look at our moral phenomenology. But even if the problems that I have indicated are genuine, this does not indicate that we must give up the ideals of freedom and equality, but, perhaps, that their foundation is more controversial, or simply different, than what Gaus shows. I totally support Gaus' endorsement of the ideal of free and equal persons as the constraint of a theory of social morality. I support his intention to resist imposition of views on moral persons in the name of truth, and the "imperious claim of private conscience that the social contract-liberal tradition has rejected" (Gaus 2011, 231), as well. My worry is about whether this can be achieved by a reflection on our moral practice, in the way Gaus does, and whether his strategy is less controversial and sectarian in comparison to the appeal to these ideals as foundational substantial moral values, as Rawlsians does.

2.

⁵ Some such counterexamples have been raised by Nebojsa Zelic in a discussion.

⁶ I thank Luca Malatesti for the discussion of this point.

Let's take that Gaus' concept of having sufficient reasons is victorious and let's go to Gaus' account of public justification of a moral prescription. A moral prescription is publicly justified when each normal moral agent has sufficient reasons to internalize it (or it is based on a rule that each and every agent has sufficient reasons to internalize), despite the pluralism that characterizes society. This is explained with the Basic Principle of Public Justification: "A moral imperative " ϕ !" in context C, based on rule L, is an authoritative requirement of social morality only if each normal moral agent has sufficient reasons to (a) internalize rule L, (b) hold that L requires Φ -type acts in circumstances C and (c) moral agents generally conform to L" (Gaus 2011, 263).

Public justification is achieved through an idealized model that includes idealized agents that Gaus calls Members of the Public. MoPs are idealized, but, contrary to other forms of idealization in deliberative models, they are not reduced to one single model of rational deliberative agent, like in the case of Rawls. On the contrary, they are equivalents of the real world agents that they represent, with all their diversities, i.e. they reflect reasonable pluralism. They are sincerely engaged with each others in moral deliberation, and not in bargaining or strategic behavior, they recognize others as free and equal and they recognize their various standards of moral justification by the only limit that they must be intelligible as such. Their reasoning is comparative, i.e. they always deliberate by comparing a rule to its possible alternatives (or, to the possible alternatives that are known as such). One of the alternatives is, also, to not have a rule at all on a subject matter. For example, one can prefer not to have any rule that regulates sexual behavior. We can easily imagine such a situation, or even think of possible examples of people with such a view. Because of the fact that a rule is justified only if each MoP has a sufficient reason to endorse it, if there is at least one MoP who prefers a condition of no rule at all for a domain, then, this is a domain of blameless liberty. In other cases, a MoP can prefer the domain to be regulated, but can prefer no rule at all in this domain, then one of the specific proposed rules. Perhaps, such is the case of parents' rights and duties in relation to their children, as in the previous discussion (some regulation, but none when cultural or religious issues are at stake). In such a case, the rule is defeated, but the domain is not of blameless liberty. The proposals that a MoP accepts as preferable to no rule at all in a domain form her individual eligible set. The set of all individual eligible sets is called socially eligible set.

There are constraints to the rules that can enter in eligible sets, precisely, it is required to restrict the choice "to rules that qualify as bona fide moral proposals" (Gaus 2011, 294). Such general constraints that Gaus discusses include generality, weak publicity, conflict resolution and claim validation, rules must provide very weighty reasons to act, universalizability and reversibility and a modest common good requirement. Gaus indicates how this constraint can function in order to eliminate rules on the example of James and John Stuart Mill. Notoriously, James Mill denied the right to vote to women and he thought that they are sufficiently protected by their fathers or husbands. He made a mistake that his son, John Stuart, did not make: he "simply failed to appreciate the good of others and the ways rules impact their evaluative standards" (Gaus 2011, 313). So, there are grounds to reject the voting rule proposed by James Mill. We see from this that "one ground for refusing to grant authority to a rule is that, according to the evaluative standards of a Member of the Public, it fails to adequately meet the

constraints on moral rules, especially the requirements of the common good and reversibility” (Gaus 2011, 315).

Other grounds for refusal include rejection based on the excessive cost of moralization and blameless liberty as the default. The latter will appear as particularly important. In order to treat one as free and equal, we must not claim moral authority over a person, except if she herself has sufficient reasons to endorse this instance of moral authority. As a consequence, blameless liberty is the default. As Gaus says, “there is an asymmetry between Alf, who claims that he has moral authority over Betty, and Betty who denies the authority of the rule. Alf’s claim is justified only if Betty has reasons to endorse the authority; Betty’s claim is justified simply if there are no reasons. She does not have to provide a case for rejecting Alf’s claim to authority” (Gaus 2011, 319).

Even after the application of these filters, there remains wide indeterminacy. How do we choose the rule that is finally established as the social moral rule in a society? The first step is represented by ranking them in order to see whether there are proposals in the social eligible set that all MoPs rank below other proposals. The proposals that are not defeated in such a process form the optimal eligible set. Let’s remember that MoPs are idealized, but idealized by respecting the pluralism of real world people. For this reason, the optimal eligible set includes a variety of alternative rules, with no agreement on which are the best for every specific domain. But, as Gaus remarks, not having social moral regulation of a domain may be costly (imagine the absence of regulation of speech). For this reason, the optimal eligible set is not empty.

How do we choose from the optimal eligible set? The first resource that Gaus indicates is based on abstraction. “We might bracket our disagreements and identify some shared perspective, which provides the grounds for shared reasoning” (Gaus 2011, 335). A successful argument from abstraction must respect three conditions. (i) There must be a shared perspective. (ii) This perspective must identify really important evaluative standards. As will become evident, the third condition is particularly important in Gaus’ discussion, because it represents a point where he thinks that other arguments from abstraction have failed: (iii) “It must be the case that the deliberative conclusions are not overturned as the process of abstraction is undone and Members of the Public are again understood to be guided by their full set of evaluative standards. What was simply ‘freestanding’ must, if it is to be fully justified, serve as a ‘module’ that fits into each free and equal rational moral person’s set of evaluative criteria. In the end, to publicly justify must be to justify in terms of all relevant evaluative criteria” (Gaus 2011, 336).

The abstraction used by Gaus is the perspective of agency. There are several things that everybody wants to protect from this perspective. First, there is the presumption in favor of liberty, i.e. in social morality, agents have no obligation to justify their choices to others, but they must not exercise their liberty in such a way that they damage others’ agency. Second, there is autarky, the minimum condition for self-directed agency. Autarky is absent in the case of obsessive behavior, dissociation of the self from its agency, severe disruption of deliberative and belief-forming processes and brainwashing. From the perspective of agency we want to protect the rights not to be

coerced and deceived. Freedom of thought has a core status. By following Gewirth, Gaus remarks the importance of welfare and resources, from the perspective of agency. As Gaus says: “The perspective of agency leads to endorsing some welfare rights. [...] Agents, as Members of the Public, would not simply be concerned with maintaining the minimal conditions for agency but also with acquiring the goods of an effective agency — one that is successful in achieving one’s aims, end and values. [...] Each Member of the Public, deliberating simply on the values of agency, would weigh whether some guarantee of goods or resources would have a net positive impact on her agency, given the risks encountered in social life” (Gaus 2011, 359).

This is what follows from the perspective of agency. It is important, now, to see whether it fits into each moral person’s standards of evaluation. Gaus thinks that there are no problems so far as the, let’s call it, freedom part is concerned. Problems regard the welfare and assistance part. Some Members of the public will reject it. For some of them, principles of desert (that consists of both a positive notion that includes, for example, benefits for contribution to the common good or for being prudent, as well as bad things that are proper for people who undermine the common good, are imprudent, etc.) are a matter of strong devotion. Remember that it is sufficient that just a few people do not have a sufficient reason to embrace a rule in order to defeat it.

As a conclusion, undeserved assistance is defeated. What about a principle that opposes only the effect of brute luck? “Give people what they deserve, but do not allow basic goods to be distributed simply on the basis of brute luck” (Gaus 2011, 365). But, says Gaus, even here there is a defeater, precisely Hayek’s criticism of the anti-luck sentiment that, according to him, is inconsistent with how markets operate. The reward that comes from market is reward for obeying others’ wishes, and not reward for providing others’ with benefits related to doing what we thought best. An entrepreneur’s success may derive from being simply in the right place in the right time, which allowed her to perceive a successful way to satisfy others’ wants. This, Gaus says, is not an unreasonable position that can be excluded from the justificatory public. As a consequence, it is a defeater of proposals of redistribution aimed to compensate brute luck.

Other features are taken in consideration by Gaus. Non adversity to risk is a psychological feature that influences one’s attitude toward assistance politics. Policies of assistance may be incentives to imprudent behaviors, and, as a consequence, prudent people have to pay for those imprudent.

However, Gaus does not deny that some duties of assistance are fully justified: “Consider a duty that required us to rescue another (i) from extreme danger to her crucial welfare interests when (ii) the imperiled person is not responsible for her plight (iii) and is not in a position to easily extricate herself from her predicament, while (iv) we are in a position to effectively do so at (v) no or very low cost or risk to ourselves. It is hard to see how reasonable agents, who understand that unexpected and extreme threats to life, limb, and property arise and can destroy one’s ability to pursue one’s values and goals, would have defeaters of such a minimal duty. It is also hard to see, though, how a much more extensive right to assistance can go undefeated under full justification among a

public deliberating on a diverse set of evaluative standards” (Gaus 2011, 367).

It is important to remark that by his argument, Gaus is not rebutting the possibility of a defense of a more egalitarian redistributive state. He is only saying that this justification is not provided by a mere appeal to the claims of agency. “Whatever strong rights people have to the provision of goods is not an implication of the claims of agency itself or the idea of the basic claims of reasonable and rational free and equal persons, but involves difficult and controversial issues about the justification of an overall scheme of property and proper public policy — issues that are essentially matters for settlement in the political arena, in which individuals who reasonably disagree on these matters can adjudicate their differences. [...] In contrast, there is wide and deep consensus on agency freedom and abstract rights not to be harmed” (Gaus 2011, 368). We will see below further reasons that Gaus offers to oppose a redistributive state.

As we see, arguments from abstraction help to make some progress. But a relevant limit that their results have is represented by their generality. They need to be interpreted. Think about the abstract right of freedom of speech. MoPs will agree on such a right and on an eligible set of its interpretation, because it is a very important right to be protected, but there will be divergences about the interpretations. Here, again, there will be the kind of indeterminacy already known: there will be sets of eligible interpretations, with no decisive interpretations.⁷

An important response to the indeterminacies is represented by the partitioning of moral space: authority over different parts of the moral space will be devolved to different individuals, with a system of jurisdictional rights. Among such rights there is, for example, the right to privacy that includes immunity in a sphere where what one does is not others’ business and the right that some information about us are not disseminated without our consensus. An important jurisdictional right is represented by the right of private property. Gaus says that MoPs will endorse a system of property rights that will tend to be strong in two senses, these rights will not be easily overridden and will be extensive, i.e., they will not include only consumer goods. Gaus remarks, for example, the right to be the owner of a residence. This right ensures for each person the right to have a space where no interference is admitted, while, for example, if all residences are owned by the state, it has the right to determine what people can do in their homes. “If all buildings are public, the freedom rights of dissenting groups are almost certain to be severely curtailed” (Gaus 2011, 378). A further justification for the right to property is represented by the fact that it is related to the system of values of some people. This appears as a strong reason to oppose redistributive states. As Gaus says, “Entrepreneurship is itself a form of human flourishing. [...] Start-ups, innovation, risk taking, organizing groups to resolve problems and implement new ideas – all these are not simply ways to produce the stuff to be distributed according to ‘economic justice’: they are basic to evaluative standards of some Members of the Public” (Gaus 2011, 379). Such evaluative standards can function as defeaters of

⁷ Andrew Lister raises an interesting problem here, whether Gaus’s discussion of the freedom of speech is coherent with the discussion of redistributive politics. The problem that Lister (2013) discusses is whether there is a divergence in the latter, in comparison to the former, because when Gaus debates redistributive politics, part of his strategy is to support the primacy of the less coercive rules in the eligible set, which is not affirmed in the discussion of freedom of speech.

redistributive policies. To be sure, in the part of the book from which I have extrapolated the quotation, Gaus directly argues against socialism. But maybe the argument could be intended to be directed toward liberal egalitarian distributive policies as well.

We are still in a condition of indeterminacy, although it is reduced. How can we arrive to more determinate results? Gaus rejects the answer offered by the proposal of reasoning together, i.e. deliberative democracy. He thinks that this is the way that can lead to authoritarianism and oppression. “In the end deliberative democrats acknowledge that we must cut off discussion and take a vote, but then the majority is subjugating others to their judgment in the name of public reason — reason that is not shared by the dissenting minority. Once we accept that our disagreements are widespread and deep [...] democratic procedures simply are not up to the task of collective commensuration” (Gaus 2011, 388).

Here evolution comes back in the story. People coordinate in their social interrelations on some rules. All such rules are, then, justified by the standards of all MoPs, because they are selected from the eligible set. No MoP can complain, even if the rules on which MoPs converged are low ranked in her individual eligible set. “*Ex ante*, Betty does not have reason to accept y over x , nor does Alf have reason to accept x rather than y . They do, however, have reason to coordinate on either of the two requirements rather than none at all. That is, they have reason to coordinate on some member of the eligible set. [...] Should Alf and Betty find themselves at x/x neither would have reason to unilaterally change his or her action. Given each of their evaluative standards, they would have the most reason to act on rule x . Should they instead to find themselves at y/y , each would then have most reason (given his or her evaluative standards) to act on y . [...] *consulting simply his or her own evaluative standards, each has decisive reason to freely endorse whichever moral requirement they have coordinated on*” (Gaus 2011, 394). This is so because each MoP has two distinct desiderata, one is to have the possibility to act on the moral requirements that correspond in the best possible way to her evaluative standards, the other to act on moral requirements that others endorse, as well, in order to make legitimate authoritative moral demands respectful of others’ status as free and equals. A further consequence is that in the coordination process, MoPs will converge on options that become slightly more popular than the others. The equilibrium that will be achieved is, therefore, path dependent. There is no external, or *ex ante*, reason to judge one equilibrium better than another, but once an equilibrium is established “each Member of the Public, consulting only her own evaluative standards, will freely act on the moral requirement in equilibrium” (Gaus 2011, 400). The rules in equilibrium are, for each agent, what best satisfies her standards considering what other MoPs are doing. They are “the choice of social creatures, who must take into account what others are doing, and cannot dictate to the group their preferred rule” (Gaus 2011, 402). Once a society has found equilibrium on a rule, this rule is the one that is rationally justified, “it then is the one rule that all have reason to endorse” (Gaus 2011, 403).

One might object that it is unfair that in the equilibrium rules are justified that are the favored option for some MoPs (i.e. the evaluative standards of some MoPs support the rule at the highest level), while at the bottom of the ranking of the eligible set of other

MoPs (i.e. it may even be the case that the rule is just a little bit preferable than no rule at all). The suggestion is that the reasonable solution would be to compromise, i.e. to bargain and to look for a compromise solution. But Gaus says that it is not legitimate to require compromise and half-meetings. Public justification is not “about the correct compromise concerning how much the moral rules we live under reflect our basic normative convictions, as if they were pots of money to be divided up, or negotiation aims to be haggled over” (Gaus 2011, 332). He replies to the critics by saying that “compromise is not always a good, and it certainly is not always demanded in virtue of a person’s devotion to a moral life. That each member of the Public accepts that some option *z* is in the optimal eligible set only if each and every free and equal person has sufficient reason to accord *z* moral authority on the basis of her own evaluative standards, and that all the elements in the set satisfy the formal constraints on moral rules already shows that all Members of the Public have a commitment to respect the standards of others and do not press for moral rules that some cannot freely endorse” (Gaus 2011, 407).

Some MoPs will be very reluctant to accept coercion, i.e. they think that in many cases the benefits of coercion do not outweigh the costs. Such are, says Gaus, classical liberals. Although the optimal eligible set may contain laws far away from their ideal, they will tend to move the eligible set in a classical liberal direction, i.e. to reduce the space of coercion and state intervention. Again, an objection will appear that they have to meet others on halfway. But this reply has already been rebutted. Classical liberals’ views are reasonable and intelligible and can be parts of the eligible set. As he has already said, Gaus repeats that this is sufficient. There is no need for further compromising, “this is to turn justification and self-legislation into a bargain” (Gaus 2011, 506).

So, in virtue of the fact that their views are reasonable, classical liberals reduce the range of the eligible set. Is it possible to counter them by criticisms of the small state, by evaluative standards that remark that low levels of law coercion do more harm than good? “Jack might hold that a classical liberal state that enforces property rights with a modest provision for the poor imposes coercion costs on the poor that exceeds the benefits, and so such state is not justified in his view. [...] What is important about Jack is that he accepts Alf’s ‘Millian’ evaluation of the costs of coercion, but nevertheless rejects the least coercive option” (Gaus 2011, 507). However, Gaus replies, Jack’s objection cannot be successful. The classical liberal state performs important functions, for example the protection, articulation and development of the rights of agency, privacy and freedom of association. In virtue of this, classical liberal ‘small’ states will have justified authority. Although this kind of state is not optimal from the standpoint of Jack’s evaluative standards, it is nevertheless justified by them. As we already know, optimality is not required in order to be included in the evaluative set and, so, here, the ‘classical tilt’ of liberalism wins: “all reasonable persons devoted to the basic rights of body, the person, speech, and so on accept that the benefits of political authority exceed the costs across a wide range of systems. Given the order of justification, the basic liberties of the person and civil rights are powerful justifiers of small states — although larger states certainly reasonably can be thought to be optimal” (Gaus 2011, 508). In brief, even those who do not rank the small state highly will prefer it to the absence of at least the protection that it offers, while “classically

liberal-inclined citizens will rank few if any redistributive laws as better than no laws at all” (Gaus 2011, 521). The reason for this rejection is related to the idea that the more a state is redistributive, the more it is coercive. For example, noncompliance rises as tax rates rise, with the consequence of increasing the amount of money spent by the state in order to avoid this and coercion of noncompliers, inclusive of intervention by criminal law. Furthermore, increase of taxes makes some options more difficult, in particular in the domain of entrepreneurship that, as we have seen, is part of the system of value of some agents.

Notoriously, John Rawls has put forward criticisms to some forms of states characterized by private property, in particular to those forms that allow great inequalities and do not guarantee the fair value of equal political liberties and do not have institutions employed to maximize the long-term prospects of the less advantaged free and equal persons. Gaus rebuts Rawls’s argument in favor of liberal socialism and property-owning democracy (a system that allows private property but, by the dispersion of wealth and capital, prevents owners of property to exercise the control of the whole economy and of political life, as well) and insists on the importance of the maintenance of extensive private property that includes means of production. In particular, he appeals to empirical data that seem to confirm the importance of extensive private property inclusive of means of production for the protection of political rights, taken as basic in the order of justification. As Gaus says, “there has never been a political order characterized by deep respect for personal freedom that was not based on a market order with widespread private ownership in the means of production” (Gaus 2011, 513-514). Rawls’s alternatives do not have any empirical confirmation, because they have never existed. On the other hand, empirical data show that “in the world as we have known it, the protection of economic liberty and private property is associated with states that do a better job of institutionalizing effective political rights (as well as civil rights)” (Gaus 2011, 515). Rawlsians may reply by saying that even if orders of extensive private property of means of production are necessary in order to protect civic and political rights, those systems that allow high economic inequalities are a menace for the fair value of political liberty. Gaus replies that the claim is simply taken as obvious and conjectural: “Whether citizens have real input — whether their political rights actually have ‘fair value’ — is a matter of complex sociology, involving the features of political culture, including levels of civic participation, institutional structures relating business and governments, the existence of power centers outside of government, levels of overall wealth, and so on” (Gaus 2011, 517). In the interpretation of empirical data, Gaus says that the most important variable to explain the level of protection of political rights is represented by the level of wealth and income, while equality in their distribution is a relatively minor factor.

3.

Gaus’ proposal is the most relevant alternative to Rawls’ in the domain of public reason liberalism. I now dedicate some thoughts to see how much and in what points the two proposals are divergent. Both proposals accept the idea of free and equal agents as basic. Both proposals accept the idea of reasonable pluralism. Gaus remarks his more stringent adherence to reasonable pluralism. He criticizes Rawls and Rawlsians for

not respecting this idea fully. There are mainly two reasons. For Rawls and Rawlsians, public justification is based on shared standards of evaluation, exclusive, for example, of comprehensive doctrines. For Gaus, public justification is based on all bona fide moral intelligible standards of evaluation. Second, although both Rawls and Gaus employ an idealization, Rawls's agents are idealized in a way that renders all of them deprived of their specific features, and, therefore, the choice is reduced to the choice of a single abstract subject. On the other hand, Gaus's idealized agents, MoPs, maintain the pluralistic features of their real-world counterparts. It might be said that Gaus's model has stronger empirical constraints than Rawls' (not to speak about Rawlsians' like Jonathan Quong, who says that even Rawls does not admit sufficient idealization).⁸ All this must be taken with some caution. It is true that basically Rawls's theory is based on a freestanding argument grounded on idealization. But it is also required that the principles of justice obtained in the abstraction must be confirmed by the possibility to cohere with each agent's comprehensive doctrine. There are, therefore, empirical constraints respectful of reasonable pluralism of worldviews for Rawls, as well (Rawls 1993/1996, 385-388).

On the other hand, as we have seen, there is a role for abstraction in Gaus, as well, and this is the abstraction represented by the perspective of agency. The results of this perspective must be confirmed, let's say, empirically by the whole set of reasons that the agents have ('empirically' must be qualified here; as I have shown there is some idealization even in the identification of what the reasons of agents are). At this level, some of the rights justified at the level of abstraction are defeated. So, the main difference between Rawls and Gaus appears to be the expectation of what happens when the results of the abstraction are compared with the overall reasons of agents. Rawls expects that they will be mainly confirmed, by arriving to an egalitarian liberal view of justice. It is in this sense that Gaus's statement "the core idea throughout his work is the argument from abstraction in the original position" (Gaus 2011, 336) is true. On the other hand, Gaus expects that some of them will be defeated and that the result is a classical liberal view.

Although there is an ample debate between Rawlsians and Gaus on the appropriateness of employment of religious reasons in public justification, such reasons in my view do not make a relevant difference in the results to which the two sides will arrive. The reason is that in virtue of the presumption of freedom, religious reasons can be efficaciously employed, for Gaus, only in the defense from coercion, not in support of requirements of coercion, while, on the other hand, the defense of religious rights is relevant for Rawlsians, as well. As Freeman says, "Only the most compelling reasons of justice, those regarding the protection of others' fundamental rights, should be allowed to outweigh the freedom of religious doctrine, sacraments and liturgical practices" (Freeman 2002, 24). In Freeman's opinion, the rigid application of the liberal requirement of equal treatment can generate inequalities, because equal treatment under one law can cause unequal treatment under another law. So, for example, equal treatment under the law that prohibits use of (some) drugs can generate unequal treatment under the law that ensures freedom of conscience and the related freedom of religion. This is the

⁸ Quong 2011.

case, among else, of Pueblo Indians, for whom the prohibition to use peyote interferes directly with a sacramental practice.

The important difference regards welfare, economics and social rights. Here we have Rawls's egalitarian liberalism on one side and Gaus' classical liberalism on the other side. In other words, for Rawls, the deliberative model from abstraction leads to a robust egalitarian liberal model that survives the process of full justification, i.e. its confrontation with all reasonable comprehensive doctrines. This module is not represented by a specific theory of justice, like Rawls's justice as fairness, but includes three main elements (basic rights and freedoms, special priority they have, and the resources needed in order to make effective use of them). We may say that, at the end, Rawls, like Gaus, does not propose a specific conception of justice as the result of a philosophical debate, as the conception that must be adopted by the state. He opts for something like an eligible set. The difference between Rawls and Gaus here is that for Rawls the eligible set includes egalitarian liberal principles of justice, while for Gaus the eligible set is pushed in a classical liberal direction.

It seems that the focus of Gaus' criticism of Rawls's proposal regards the robustness of the egalitarian liberal module. Further, he criticizes the view of institutional instantiation of the module proposed by Rawls, which includes two possible kinds of society, liberal socialism and property-owning democracy as compared to a classical liberal society characterized by the small state. I try to show that the Rawlsian module is defensible and that the classical liberal small state does not have a proper space in the eligible set. Alternatively, there is space in the eligible set for forms of socialism, as well. After that, I raise some doubts to the empirical arguments that Gaus puts forward against Rawls's proposals of ordering of society. I start with the first discussion, the one that regards the robustness of the Rawlsian liberal egalitarian module.

As we have already seen, in Gaus' opinion such a module does not survive abstraction, in virtue of some evaluative standards incompatible with it (importance of extensive property rights inclusive of means of production for the protection of some important rights of agency and for political rights, views about the functioning of market, the value that some agents attribute to entrepreneurship, risk of increase of coercion). Precisely, it is the third element of the module that is problematic. It is rejected by some MoPs (MoP1), who, at the same time, are ready to support moral rules and institutional arrangements important for all other MoPs, as well (MoP2). MoP2 (although part of what is justified by their evaluative standards is excluded), have reasons to accept the restricted set of rules acceptable for MoP1, because it responds to important parts of their evaluative standards, and, therefore, for them it is better to accept such a system, than to not have any system of social moral rules and moral relations with MoP1.

But is this so? MoP2 risk to be deprived of something really essential to them, i.e. the resources needed in order to make effective use of their freedoms. Why would they accept a moral relation with people who are ready to leave them deprived of the insurance of such resources? Gaus' answer is that it would be even worse for them to refuse the coordination with MoP1 on a classical liberal state. But there are problems nevertheless. MoP1 have toward MoP2 more of a strategic stance like in the case of

the ultimatum games (Gaus 2011, 119-122), than a cooperative moral stance. An important lesson from the ultimatum games is that “If in such games the Proposer gives herself the lion’s share, leaving the Disposer with her absolute minimum, the Disposer will reject the offer” (Gaus 2011, 404). But Gaus rejects the comparison between the classical liberal moral equilibrium that he describes and the ultimatum games. First, contrary to the ultimatum games, in the case at issue there are no resources to be distributed, there is no amount of utility that may be transferred from one person to another. The issue is about how well the agents’ standards are justified. Second, Gaus interprets the results of ultimatum games as punishment of violation of norms, but the issue, here, is about searching for mutually acceptable norms — there are no norms at the moment, the same as there is not an ideal of fairness. It is also inappropriate to appeal to the notion of reasonableness, as it is interpreted, for example, by Rawls, as willingness to meet others halfway. Gaus rejects the idea that compromise is good in moral issues, where it is “certainly not always demanded in virtue of a person’s devotion to a moral life. That each member of the Public accepts that some option z is in the optimal eligible set only if each and every free and equal person has sufficient reason to accord z moral authority on the basis of her own evaluative standards, and that all the elements in the set satisfy the formal constraints on moral rules already shows that all Members of the Public have a commitment to respect the standards of others and do not press for moral rules that some cannot freely endorse” (Gaus 2011, 407). In brief, if there are 10 proposals in the eligible set, there are no reasons to require a compromise for MoPs to meet at a point where the rule is fairly high for the evaluative standards of all, and not, let’s say ranked 10th by the standards of some.

I think that there is a relevant similarity between ultimatum games and the classical liberal (as opposed to egalitarian liberal) coordination, precisely the following one. In both cases we have a situation where one side offers to the other side the minimum that it needs to offer, based on the fact that for the other side such a minimum is better than not having it. The lesson of the ultimatum games is that people tend to reject such offers. Gaus says that the reason is the reaction toward unfairness, not a stance for equality. But, why not a reaction toward the absence of a cooperative stance of the other side, represented by the fact that that side takes advantage of its position and avoids to compromise and meet half-way?

The appropriate cooperative stance in the case of establishing social morality is readiness to compromise when possible by taking care of what is essential to all parts. This sense of compromise and of meeting halfway is what constitutes the will to establish a fair stable social cooperation. How would the cooperative stance look like? It does not require complete renouncing of some of the evaluative standards indicated by Gaus opposed to the egalitarian proposal. A better perspective is to consider how much these evaluative criteria can be satisfied by concessions to ensure to everyone the resources for an effective use of basic freedoms and rights. It may be possible to give a positive response to the claim of agency (help some to maintain the conditions of effective agency), while saving at the same time the core of the evaluative standards of those who value desert, do not see luck as something that legitimates redistributive troubles, and value entrepreneurship. One can be an entrepreneur even in a redistributive situation (or a manager in a structure of collective property, instead of private ownership of

means of production; there were highly estimated managers in the socialist Yugoslavia, for example), and because the egalitarian liberal system still allows inequalities there would be space both for taking in consideration the evaluative standards of desert, as well as of those who disregard considerations about luck as morally relevant.

For many MoPs there are reasons to reject the inegalitarian liberal equilibrium other than ultimatum games motivations. In fact, more important reasons. Namely, the denial of the egalitarian liberal element of Rawls' proposal represents the refusal of something essential to many. Let's remember that the criterion for a rule for being part of the eligible set of rules is that there are no MoPs for which it is better not to have regulation of a domain, than to have it regulated by that rule. It appears that, in consideration of the threat that for some is represented by the refusal of egalitarian liberalism, it is worth giving a better chance than Gaus does to the hypothesis that for some MoPs it is better not to have any rule that protects private property of means of production (and, therefore, to live in an order of collective property of means of production), than to live in a society where rules that protect private property exclude, or are not related to, some level of redistributive policies.

I add a consideration to the general thought about claims of agency to strengthen the egalitarian stance. The consideration regards studies that relate health to the social status of people. "Poverty, poor nutrition, poor living and working conditions, and unhealthy behaviors, and so on, may be much more important determinants of health than access to health care. This is the thesis of the 'social determinants of health'" (Wolff 2011, 130). Two elements are striking. "On just about every indicator there is a 'social gradient' of health, corresponding to social class. In 1980 the higher one's social class, the better one's health and the longer one lived. [...] It appears that the NHS had improved the health of those in the higher social classes, while making little difference to those of the other classes. [...] For this reason, the Black report [...] argued for massive public investment in anti-poverty action to address health inequality" (Wolff 2011, 135-136). Similar arguments were repeated in a newer report, i.e. the Acheson report of 1998. As Jonathan Wolff shows, together with material causes of worse health conditions, there are psychological factors. But such factors, again, are related to lower position in social status (Wolff 2011, 137).

From this we see that social inequalities, together with inequalities in the social status, not only affect the general capacity of agency, but a particularly important part of it, i.e. health, which is an essential component of the lives of agents. Again, it may be possible to think about MoPs who refuse redistributive rules inspired by the protection of values important for other MoPs, in the specific case the value of health, but various claims of agency, as well. Gaus indicates the possibility of agents who rank health at a lower level than other values, like, in his example, motorcycle drivers who prefer the excitement of driving without helmets, to the protection of health (Gaus 2011, 537-538). It may be possible to say the same about people who remark the value of entrepreneurship and the adrenaline of market competition. There may be several replies to the opposition to egalitarian liberalism represented by such characters.

The first reply refers to the notorious Mill's bridge example (Mill 1859/1977, 294).

In the example, as it is very well known, Mill says that it is not a case of illegitimate coercion to stop a person from crossing a bridge, even though the person wants to cross it. The reason is that the bridge is in danger and, therefore, when we stop the person we, in fact, do what the person would do if she fully considered the situation. Probably, many persons refuse redistribution because they do not sufficiently consider situations when they can be in need of it. So, the first reply appeals to the notion of ‘having a reason’. One’s reason to support redistributive rules can be a reason that one would endorse after respectable reasoning, it does not need to be a reason that one actually endorses. Ayn Rand’s life teaches in the specific case.

The second reply relates to what Gaus says about restricting people who are part of the moral constituency: “Such people do not include [...] monomaniacs who are solely committed to one and only one value, such as one who cares about nothing but counting blades of grass, or his stamp collection. Such persons are the stuff of philosophical stories and objections, but in many ways they are beyond (or at the edge of) the common human horizon” (Gaus 2011, 281). It does not seem implausible to say that people who are ready to put in danger essential aspects of agency for the sake of only one value are very close to this description of monomaniacs. I would say this about the motorcycle driver described by Gaus, but I do not see as very different people who threat essential aspects of agency for the sake of total and unconditional protection of one of the values inimical to egalitarian liberalism indicated above.

The third reply is that some such characters may have alternative ways to satisfy their passion. If they are inspired by the flourishing constituted by managerial activities described above, they can do this even in an egalitarian order. They can do this even in a socialist order, as I have said above. If they are, instead, attracted by feeling the adrenaline of market competition, they can look for adrenaline, for example, in free climbing, Blue Tornado at Gardaland (or a rollercoaster at Disney World), etc., or, they may require exemption from the protection in the market competition.

Fourth, people can reasonably reject a moral relation with agents who want to put in danger essential components of their life, inclusive of such an important element as health expectancies, and opt for only strategic relation with them. Perhaps, this is what Gaus intends to say when he writes “If a rule of our social morality is below a person’s ‘baseline’, her best response to the moral actions of others does not involve her also adopting the moral stance, but perhaps a prudential or narrowly sectarian one” (Gaus 2011a).

As a consequence of this part of the paper, it appears that the eligible set is pushed in a more egalitarian direction than Gaus writes. On one hand, many MoPs will be strongly motivated to do so, because they strongly oppose a non redistributive condition that does not protect claims of agency. On the other hand, MoPs who endorse values opposed to egalitarian liberalism are not in as bad a situation in the egalitarian liberal equilibrium, because they can satisfy the core of their values even in a redistributive order.

In support of the previous discussion, I refer to a famous quotation from J.S. Mill:

“If the institution of private property necessarily carried with it as a consequence, that the produce of labour should be apportioned as we now see it, almost in inverse ratio to labour — the largest portions to those who have never worked at all, the next largest to those whose work is almost nominal, and so in a descending scale, the remuneration dwindling as the work grows harder and more disagreeable, until now the most fatiguing and exhausting bodily labour cannot count with certainty on being able to earn even the necessaries of life; if this or Communism were the alternative, all the difficulties, great or small, of Communism would be but dust in the balance” (Mill 1848/1965, 207).

To be sure, Mill here speaks critically about injustices that derive from a distribution that does not correspond to the desert of people engaged, and not about ensuring to everybody the means for effective agency. Nevertheless, what is important is that Mill admits that there may be some conditions, in particular such that they leave some people at the edge of the possibility to live, that render preferable a system characterized by a regime of collective property instead of an order of private property characterized by such inequalities (in any event, it appears that Mill’s quotation is a good ground to start thinking about a criticism of the actual situation of economies based on private property of means of production). To be sure, it is not so easy to make use of Mill’s quotation in opposition to Gaus’ view of the position of classical, as opposed to egalitarian, liberalism in the eligible set. After all, Gaus himself shows sympathy for Mill’s quotation (Gaus 1999, 168-178).

Moreover, as history shows, communism has proved to be able to be more repressive than Mill imagined, as well as of producing poverty for ample parts of population, or, at least unable to rescue them from it. But, such a result is not necessary. Alternative possibilities can be the source for further thinking about what can happen in the eligible set. In the socialist Yugoslavia, extensive property of means of production was not allowed, but, for example, from the later 70s, although political liberties were strongly restricted, there was a considerable level of tolerance of personal liberties (in the choice of art expression — inclusive of criticisms of the regime —, practicing religion — although this was limited to the private sphere —, travelling, leisure, sexual freedoms, etc.), together with a high level of protection of social rights.

Although I don’t know about precise data, but as it is visible to everybody who lives in the territory, there are people who think that the increase of formal political liberties in the new order established in the states formed with the dissolution of the Federation does not offer a positive payoff for the loss in the level of protection of social rights. Put in other terms, it is possible to say that the claims of agency are for many more compromised now than in the previous order and that they complain for this. If this is so, it seems possible to say that MoPs representing such people will exclude small state views from the eligible set: for them it is preferable to live in an order with collective property of means of production (even if with strongly reduced political liberties, but with a considerable level of personal liberties), than in an order of private property of means of production and high social inequalities, with a low level of protection of

social rights, even if this is related to wider formal political liberties.⁹

This probably is the view shared by many people who adhere to the various ‘occupy’ and ‘indignados’ movements in the post-2008 years. In all these movements there appear to be people rather disinterested in the formal political liberties of parliamentary democracy, in favor of a strong protection of social rights.

If what I am saying is right, MoPs representing people ready to accept socialism are among agents who will push the eligible set in an egalitarian direction. One can object that these agents cannot influence the structure of the eligible set, because they are not reasonable. They renounce to some aspects of protection of agency that they have reasons to protect, i.e. political liberties, as well as to a more extended protection of personal freedoms. But I do not see the objection as decisive. After all, they are ready to renounce to this only for the sake of higher resources needed for protecting agency, or aspects of agency more important for them. They are symmetrical to the ‘small state’ oriented MoPs, who renounce to the protection of some of the claims of agency (the welfare and social part) for the sake of some of their values. Both sides appear to propose rules not acceptable for the other side. In any case, in order to oppose Gaus’ classical liberalism, it is not needed to insist with the pressure coming from the socialist side. The thesis that I support is that it is difficult to appeal to the importance of political and civic liberties as a trump against egalitarian liberalism. Only extreme and radical forms of egalitarianism are severely not acceptable for classical liberalism. My claim is on the same line as Lister’s, when he says that no right to assistance at all is reasonably preferable to only an extravagantly strong specification of the right to assistance (Lister 2013). Egalitarian liberalism can accommodate the core of the values of classical liberalism, although not in the way classical liberals find optimal. As a consequence, egalitarian liberalism seems to be the stable equilibrium between different agents if they want a common social morality. Obviously, a great deal of work must be done to complete the argument. ‘Acceptable’ must be defined more precisely, because for Gaus the question is ‘acceptable in comparison to what alternative?’

By this, we arrive at the issues of the justification baseline already raised by other authors (Lister 2010, 2013; Arneson 2011; Enoch forthcoming). Crucial to Gaus’ view of establishing the optimal eligible set is to choose rules in comparison to the option of not having any rule on the matter, at all. The problem, here, is how to group issues together. The more, as Lister says, we zoom out, the less libertarian results we have. It appears to still be an open question whether Gaus has resources to avoid this strategy. On one hand, he declares this as the job of the political process, not of philosophy (Gaus 2010, 200). On the other hand, the principled criterion that he offers in taking separated issues on justification independent (two issues are independent only if no MoP’s ranking of the rules regulating one of them depends on the rules that regard the other (Gaus 2011, 495)) seems to push away from the classical liberal proposal because

⁹ By the way, it may be worth noting that it appears exaggerated when Gaus claims that private possession of apartments is important for personal freedom. In the socialist Yugoslavia there were not intrusions in personal life that depended on the fact that many people did not have private possession of apartments, nor was there any special protection of personal life related to such possession for the people that had it. On the other hand, at least as represented in *Breaking the Code*, the film about Alan Turing’s life, private possession of his house did not protect him from repression of his sexual personal life.

it seems to favor the zooming out strategy (Lister 2013). For the sake of this paper, I hope to have shown that egalitarian oriented MoPs still need to be discussed in the context of Gaus' proposal.

I finish with some worries about Gaus' empirical arguments against Rawls' institutional framework for the respect of fair value of political liberties. Here I move to consider the discussion of Gaus' comparison of the classical liberal state with possible alternatives. Gaus says that a classical liberal state puts agents in the fairest political position in comparison to all possible orders whose behavior we can reasonably predict. Is this really so? Gaus indicates data that appear to confirm that the level of political liberties is primarily correlated to the level of welfare of society, and not to the level of economic inequality (Gaus 2011, 511-521). But it seems to me that there are some problems with his conclusions. First, there is the problem that the correlation that Gaus indicates between societies characterized by property possession (even when characterized by inequalities) and respect of political rights, stated as it is, may be only a correlation. It is still doubtful whether there is a causal relation, as well. For example, it can be the case that cultural and historical causes are predominant.

Second, there is data that appears to establish an unfair distribution of political power, in relation to the distribution of income. It appears that one of the plausible interpretations of the data is that actual democracies, even if they realize the highest level of political freedoms in comparison to other states (even with states characterized by higher level of economic equality), do not satisfy the requirement of fair value of political liberties. This is told, for example, in the UNCTAD's analysis of policies that are obviously oriented in favoring the rich against the middle class and the poor: "Neither globalization nor technological improvements inevitably require the kind of dramatic shift in the distribution of income that favours the very rich and deprives the poor and the middle-class of the means to improve their living standards. On the contrary, with more appropriate national and international policies that take into account the crucial importance of aggregate demand for capital formation, structural change and growth dynamics, job creation can be accelerated, inequality reduced and the requisite degree of economic and social stability guaranteed" (UNCTAD 2012).¹⁰

The UNCTAD's analysis that I have indicated summarized in the quotation speaks primarily of the consequences of political economies of many states, i.e. political economies that favor rich people. This is a possible strong indicator of the fact that there is an inequality in the distribution of power. The question is: why, if increasing inequalities are the results of political choice and not of inevitable trends, and if they damage the interests of the vast majority of the population, are they endorsed in democratic societies? The thesis of unfairness in the value of political liberties appears to me as the first candidate for the explanation. This, in fact, is Oxfam's thesis: "If, in the words of the old adage 'money equals power' then more unequal societies represent a threat to meaningful democracy. This power can be exercised legally, with hundreds of millions spent each year in many countries on lobbying politicians, or illegitimately with money used to corrupt the political process and purchase democratic decision

¹⁰ See also UNCTAD 2012b.

making. Joseph Stiglitz and others have pointed out the way in which financial liberalisation led to huge power for the financial industry, which in turn has led to further liberalisation. In the UK the governing Conservative party receives over half its donations from the financial services industry. Capture of politics by elites is also very prevalent in developing countries, leading to policies that benefit the richest few and not the poor majority, even in democracies” (Oxfam 2013).

I am not ready, here, to endorse the thesis without caution (although I believe that it is true). In the description of the politics of inequality that Paul Krugman offers in his *The Conscience of a Liberal*, there are several descriptions of the growth of the politics of inequality. Financial support has, in Krugman’s analysis, an important role, and, as this author indicates, it is much more directed to conservative programs, than to liberal or progressive projects. But, as results from Krugman’s analysis, the politics of inequality could not have wined without an alliance with conservative illiberal values shared by lower classes, as well. The relation between financial advantage and political success in democracy might be more complex than appears at first glance and the role of differences in the value of political freedoms must be a topic for detailed analysis. In this sense, I agree with Gaus that Rawls’ thesis needs more support. However, Gaus’ reply needs more support than he offers to it, as well. The causes of the actual supremacy of some countries in the question of political freedoms can be more complex than it may appear at first glance and it might depend, for example, primarily on historical or cultural reasons. On the other hand, it is important to see in more details whether analysis of such countries would show unfairness in the value of political liberties, after all. If this is so, the moral equilibrium that results from such processes might be such as not attracting the stable adherence of many members of society.¹¹

¹¹ I thank very much, for the real precious help, numerous colleagues and friends who have discussed earlier drafts of the paper, and, more in general, issues of public reason with me. First, I thank Gerald Gaus for his participation and for his discussion at the symposium dedicated to *The Order of Public Reason* that the Department of Philosophy has organized in December 2011, as well as for all other occasions to discuss issues of political philosophy during his stay in Rijeka. I owe many thanks to Jonathan Quong for his patient and thoughtful discussions in Rijeka and Rome. Enes Kulenović has read the paper and has sent me important comments on an earlier draft of the paper. Many thanks to the colleagues who have participated in the reading group dedicated to *The Order of Public Reason* at the Department of Philosophy of the University of Rijeka: Boran Bercic, Nenad Miscevic, Neven Petrovic and Nenad Smokrovic, and, in particular, to the colleagues who have participated in the reading group from its beginning to the end, Zdenka Brzovic, Marko Jurjako, and the “Fellowship of Public Reason”: Ivan Cerovac, Luca Malatesti (who has read several drafts of the paper), Andrea Mesanovic, Snjezana Prijic-Samarzija and Nebojsa Zelic. Many thanks to Riccardo Mangano for language editing.

REFERENCES

- Arneson, R. 2011. For a New Liberalism. *CATO Unbound*. Accessed April 8, 2013. <http://www.cato-unbound.org/2011/10/10/gerald-gaus/range-justice-or-how-retrieve-liberal-sectual-tolerance>
- DePaul, M. 1993. *Balance and Refinement. Beyond Coherence Methods of Moral Inquiry*. London: Routledge.
- Enoch D. forthcoming. The Disorder of Public Reason. A Critical Study of Gerald Gaus' *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World*.
- Freeman, S. 2002. Liberalism and the Accommodation of Group Claims. In P. Kelly (ed.), *Multiculturalism Reconsidered* (18-30). Cambridge: Polity Press.
- Gaus, G. 1996. *Justificatory Liberalism. An Essay on Epistemology and Political Theory*. Oxford: Oxford University Press.
- Gaus, G. 1999. *Social Philosophy*. New York: M.E. Sharpe.
- Gaus, G. 2010. On Two Critics of Justificatory Liberalism. A Response to Wall and Lister. *Philosophy, Politics and Economics* 9 (2): 177-212.
- Gaus, G. 2011. *The Order of Public Reason*. Cambridge: Cambridge University Press.
- Gaus, G. 2011a. For a New Liberalism. *CATO Unbound*. Accessed April 8, 2013. <http://www.cato-unbound.org/2011/10/10/gerald-gaus/range-justice-or-how-retrieve-liberal-sectual-tolerance>
- Gaus, G. 2012. Sectarianism without Perfection? Quong's Political Liberalism. *Philosophy and Public Issues* 2 (2): 7-15.
- Kitcher, P. 2011. *Science in a Democratic Society*. Amherst: Prometheus Books.
- Krugman, P. 2007. *The Conscience of a Liberal*. New York: W.W. Norton and Company.
- Lehrer K. and C. Wagner. 1981. *Rational Consensus in Science and Society*. Dordrecht: Reidel Publishing Company.
- Lister, A. 2010. Public Justification and the Limits of State Action. *Philosophy, Politics and Economics* 9 (2): 151-175.
- Lister, A. 2013. The classical tilt of justificatory liberalism. *European Journal of Political Theory* 12 (3): 316-326.
- Mack, E. 2011. For a New Liberalism. *CATO Unbound*. Accessed April 8, 2013. <http://www.cato-unbound.org/2011/10/10/gerald-gaus/range-justice-or-how-retrieve-liberal-sectual-tolerance>
- Mill, J.S. 1848/1965. Principles of Political Economy. Part I. In *Collected Works of J.S. Mill*, Vol. II., ed. J.M. Robson. Toronto: University of Toronto Press.
- Mill, J.S. 1859/1977. On Liberty. In *Collected Works of J.S. Mill*, Vol. XVIII., ed. J.M. Robson. Toronto: University of Toronto Press, 213-310.
- Moon, A. 2001. Blog on *The Order of Public Reason*. Accessed February 10, 2012. <http://publicreason.net/2011/02/28/opr-iv13-the-reasons-one-has/>
- Oxfam. 2013. *The cost of inequality: how wealth and income extremes hurt us all*, Oxfam Media Briefing, 18 January 2013, Ref: 02/2013. Accessed February 5, 2013. <http://www.oxfam.org/sites/www.oxfam.org/files/cost-of-inequality-oxfam-mb180113.pdf>
- Quong, J. 2011. *Liberalism without Perfection*. Oxford: Oxford University Press.
- Quong, J. forthcoming. What Is the Point of Public Reason? *Philosophical Studies*.
- Rawls, J. 1993/1996. *Political Liberalism*. New York: Columbia University Press.

- Rossi, E. forthcoming. Legitimacy, Democracy and Public Justification: Rawls' Political Liberalism vs Gaus' Justificatory Liberalism (November 10, 2012). *Res Publica*. Accessed May 15, 2013. <http://ssrn.com/abstract=2232789>
- UNCTAD. 2012a. Trade and Development Report 2012. Overview, New York and Geneva, 2012. Accessed January 7, 2013 http://unctad.org/en/PublicationsLibrary/tdr2012overview_en.pdf
- UNCTAD. 2012b. Trade and Development Report, 2012. Policies for Inclusive and Balanced Growth, Geneva and New York. Accessed January 7, 2013 http://unctad.org/en/PublicationsLibrary/tdr2012_en.pdf
- Wall, S. 2010. On Justificatory Liberalism. *Philosophy, Politics and Economics* 9 (2): 123-149.
- Wolff, J. 2011. *Ethics and Public Policy*. London: Routledge.

Received: June 6, 2013

Accepted: July 3, 2013

The Department of Philosophy
University of Rijeka
Sveučilisna avenija 4, 51000 Rijeka
Croatia
ebaccarini@ffri.hr