

GAUSSEAN EQUALITY: A CRITICAL EVALUATION OF THE FREE AND EQUAL
IDEAL IN PUBLIC REASON LIBERALISM

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IDEAL IN PUBLIC REASON LIBERALISM

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Abstract

A fundamental problem in political philosophy is how the freedom and equality of persons can be reconciled with the authority of social morality or law. The Kantian solution is to hold that the exercise of authority can be legitimate if and only if it is freely endorsed by the subjects of its exercise; thereby allowing persons to act as both subject and legislator. However, the fact of reasonable pluralism makes this approach problematic. A recent attempt to solve this conflict between authority and the free and equal idea, while also accounting for the fact of reasonable pluralism, is the theory of public reason liberalism developed by Gerald Gaus. The aim of this thesis is to give a critical evaluation of how successful Gaus is in solving this fundamental problem, while also situating public reason liberalism within the larger debate. The first chapter gives an overview of Gaus's theory and introduces some preliminary worries about the possibility of successfully converging on a workable set of socio-moral rules under public reason liberalism. Chapter two goes further, developing an internal critique of Gaussean public reason liberalism, and showing how this critique could play out using real-world examples. Chapter three explores alternative approaches to realizing the free and equal ideal in an attempt to situate Gaus's theory within the larger debate; finally concluding that Gaussean public reason liberalism is deeply problematic, both on a theoretical and a practical level, yet still offers important insights into the relationship between social-morality and the freedom and equality of persons.

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Introduction

A fundamental problem in political philosophy is how the freedom and equality of persons can be reconciled with the authority of social morality or law. Put differently, how can one free and equal moral person make a prescriptive moral claim on another without disrespecting their status as a free and equal moral person? One potential way to reconcile authority with the freedom and equality of persons is the Kantian approach, which states that the exercise of authority can be legitimate if and only if it is freely endorsed by the subjects of its exercise; thereby allowing persons to act as both subject and legislator (of the socio-moral rules or laws they live under). However, the problem with the Kantian solution (as well as similar approaches by Rousseau and Rawls, and the modern philosophers who build on their work) is that the fact of reasonable pluralism makes it implausible that diverse individuals within modern multicultural societies can reasonably be expected to endorse the same set of socio-moral rules or laws.

One recent attempt to reconcile authority and the free and equal ideal, while also accounting for the fact of reasonable pluralism, is the theory of public reason liberalism developed by Gerald Gaus. Like Kant, he holds that a rule is only legitimate if its subject freely endorses the rule, but he argues that it is possible for people with diverse evaluative standards to converge on a shared set of acceptable socio-moral rules because of the strong benefits afforded by living under a shared social-morality, as opposed to a state of nature. This thesis will argue that Gaussean public reason liberalism is deeply problematic, both on a theoretical and a practical level, yet still offers important insights into the relationship between social-morality and the freedom and equality of persons.

The first chapter gives an overview of Gaus's theory and introduces some preliminary worries about the possibility of successfully converging on a workable set of socio-moral rules under public reason liberalism. Chapter two goes further, developing an internal critique of Gaussean public reason liberalism, and showing how this critique could play out using real-world examples. Finally, chapter three explores alternative approaches to realizing the free and equal ideal in an attempt to situate Gaus's theory within the larger debate.

Chapter 1

Definitions and Preliminary Groundwork

This chapter will begin with a brief overview of justificatory liberalism, before moving to introduce some of Gaus's key concepts such as: *members of the public*, *the reasons one has*, *the eligible set*, and *defeaters*. Once these are understood we will turn to the null set dilemma. Gaus sees "the core commitment of justificatory liberalism" as "the requirement that laws be justified to all citizens".¹ The law must be justified to those subject to them, and the grounds for justification must be *accessible* and *acceptable* to said subjects. Gaus connects this to the Kantian idea that "each [citizen] is subject and legislator: each is subject to the law, yet each legislates the law, and so all [are] free and equal under the law".² This public justification requirement is necessary to respect people as free and equal. Without the endorsement of the subject any coercive law is fundamentally unjust. It is important to stress that this is not simply *tacit* consent, for a law to be justified each and every citizen must have "conclusive reason to accept it"; though their reasons for accepting it may (and likely will) be different.³ In this way, Gaus argues, people may converge upon a shared set of rules despite having very different fundamental beliefs, and, consequently, different reasons for endorsing the same set of rules.

1 Gaus & Vallier, 2.

2 *Ibid.*, 1. (Citing Kant).

3 *Ibid.*, 1. (Citing Kant)'s argument against hypothetical consent in (Gaus, 2012. 265).

3 *Ibid.*, 2. See also Gaus's argument against hypothetical consent in (Gaus, 2012. 265).

1.1 Public Reason Liberalism Defined

Turning from justificatory liberalism in general we may now discuss the particulars of Gaus's latest contribution to the area, his account of public reason liberalism.⁴ In his latest book Gaus argues that it is possible for diverse peoples within a pluralistic society to converge upon a shared social morality. Elsewhere he has given similar, but less thorough, arguments for how there can be convergence on a set of rules or laws.⁵ However, since most of the following will be based on his theory of public reason liberalism, where he shifts focus from laws to socio-moral rules or moral requirements, it would be useful at this point to briefly explain Gaus's conception of social morality.

Gaus defines social morality as “the set of social-moral rules that require or prohibit action, and so ground moral imperatives that we direct to each other to engage in, or refrain from, certain lines of conduct”.⁶ Social morality so understood is distinguished from morality in general in that it provides a set of rules which “structure social interaction in ways that are beneficial to all and make social existence possible”.⁷ There are obvious benefits from the ability to coordinate and cooperate with other moral agents using a shared social morality, but in order for social-moral rules to be effective in structuring social interaction in a beneficial way these rules must *constrain* individuals in how they go about pursuing their goals. Thus, following social morality involves a trade

4 Gaus, 2012.

5 See: Gaus, 2009; Gaus, 1996; and Gaus & Vallier. Gaus argues that the mechanism for *convergence* is roughly the same for both moral and legal rules.

6 Gaus, 2012. 2.

7 *Ibid.*, 3. Gaus notes that both Hobbes and Hume shared this general insight about the necessity of shared social moral rules for peaceful coexistence and mutually beneficial cooperation between persons.

off between restricting the individual freedoms of participants, and reaping the benefits of large-scale cooperation between moral agents in social life. Grounding social morality in the requirement of social interactions between moral agents is what Gaus terms the “Baier-Strawson analysis of social morality”, but he is quick to note that this is not a purely pragmatic or instrumental account – in order for a *social rule* to qualify as a *moral rule* it must be justified from the moral point of view.⁸ However, while we have non-instrumental reasons for following the rules of social morality, Gaus claims that this is not dependent on any *particular* metaphysical understanding of moral rules.⁹ The relevant aspects of social morality for the present discussion is that social-moral rules are *imperative, prescriptive* (and descriptive), and involve *deferring our own private judgement* to the demands of morality (though this requires applying one's own *interpretation* of the demands of morality).¹⁰

This brings us to the fundamental problem: the practice of social morality includes issuing imperatives to other moral persons, but this involves asserting one's own private judgement over the judgement of another in interpreting the demands of social morality, which is unacceptable to free and equal moral persons. Public reason liberalism is Gaus's attempt to reconcile the exercise of moral authority over a fellow free and equal human being in social interactions, and that persons' own freedom to decide what morality demands and accept or reject your imperative accordingly.

8 *Ibid.*, 3-4. “Baier-Strawson” as in Kurt Baier and P.F. Strawson.

9 *Ibid.*, 14. Gaus discusses various metaphysical interpretations of morality in section 1.3, drawing on the work of R.M. Hare who he follows “...in putting aside ontological issues about the nature of morality.”

10 *Ibid.*, 6-14 (Section 1.3).

As mentioned above, Gaus follows Kant in holding that justified morality involves rational beings acting as both subject and legislator.¹¹ He is quick to note, however, that “[we] must not confuse members of the realm of ends with actual persons”, who are often biased, confused, obstinate, and irrational.¹² Instead, we must “abstract away from obvious failures of impartiality and rationality” in order to “appeal to the reasons of all moral persons seeking to legislate for (i.e., give imperatives to) other moral persons”.¹³ That is, in order to understand how a functional social morality may be justified we do not have to account for the range of actual motivations or explanations people have for issuing moral imperatives to others; those that are nonsensical or clearly incompatible with treating others as free and equal may be rejected or ignored, at least for the sake of constructing a theory.

That being said, neither do we wish to over-idealize our moral agents and risk reducing a “problem of choice among people who disagree... to a choice by one [idealized] person”.¹⁴ This would ignore Rawls’s “insight that a wide range of rational disagreement is the ‘normal result of the exercise of human reason’”.¹⁵ Persistent fundamental disagreement among reasonable peoples is a product of pluralistic society, and any useful explanation of how people may endorse a shared set of justified moral rules or laws must address this fact, not simply abstract it away. Moreover, if we take the

11 *Ibid.*, 25.

12 *Ibid.*, 26.

13 *Ibid.*

14 Gaus & Vallier, 9. The idea here is that if we treat our moral reasoners as perfectly rational unbiased agents it is only natural to assume that they will all reason to the same conclusions, that is, the same exact set of moral rules. Gaus actually rejects this idea, arguing that even rational Herculi would reason to different moral conclusions because of the path-dependency of reasoning, but this merely reinforces the argument for taking pluralism seriously. See section 13.2 in Gaus, 2012.

15 *Ibid.*, 5. (Citing Rawls, *Political Liberalism*, 1996. p xviii).

idea of rational disagreement seriously, Gaus argues, we must accept that this shared set will be a product of convergence, not consensus. “The consensus conception of public justification... is hostile to any genuinely pluralistic reasoning in public justification”, because it holds that we must endorse a rule for the same shared reasons, essentially requiring that all members of the public reason in the same way, at least publicly.¹⁶

1.1.1 Members of the Public

For these reasons Gaus strikes a middle ground with his “Members of the Public”, which are “idealized counterparts of actual members of the public”.¹⁷ A member of the public is idealized in the sense that her reasoning is sound and she seeks to endorse only those rules that can be impartially accepted by all. This follows from our commitment to viewing others as free and equal, which makes the endorsement of any coercive rule that we cannot in good faith believe others would accept unjustified.¹⁸ But, members of the public are still grounded in reality in that they still rely on reasons accessible to *actual* moral agents. Further, they differ both in their background conditions and the “sophistication of their moral reasoning”.¹⁹ Thus, while members of the public may be idealized enough to avoid cases of clear bias or faulty reasoning, they still accommodate a great diversity in their justifications of moral rules.

Expanding on this concept, members of the public make their moral judgements based on what Gaus calls “The Reasons One Has”, or *undefeated* reasons, which are

¹⁶ *Ibid.*, 10. We will return to this point in more detail when discussing the null set dilemma.

¹⁷ Gaus, 2012. 276.

¹⁸ *Ibid.*, 26.

¹⁹ *Ibid.*, 277. Gaus refers to Kohlberg's stages of moral development when discussing differences in the sophistication of moral reasoning.

defined as “[one’s] *best* reason on the matter after an adequate amount of deliberation”.²⁰ Gaus is quick to acknowledge that this is a somewhat vague standard, but points out that what counts as adequate deliberation is always contextual.²¹ Further, given that members of the public differ in their moral sophistication, as well as the amount of time they have to spend reflecting on these matters, “[a] social morality that all have reason to grasp must neither presuppose sophisticated reasoning, nor must it ignore it when it occurs”.²² That is, a rule is only publicly justified if those deliberating at various levels of sophistication have sufficient reasons to endorse it. Admittedly, this idea still may seem somewhat vague, but the point Gaus is pushing at here is that there is a distinction between “the reasons there are” and “the reasons one has”; with the former being essentially a metaphysical question, and the latter an epistemological one.²³ Only the latter category concerns public reason, because members of the public can only deliberate on reasons that are in some sense *accessible* to them, and since members of the public are *idealized versions of actual people* the reasons they possess will arise from a realistic level of deliberation.

Now that we understand the level of abstraction at which Gaus’s public reason liberalism operates, we can start to discuss how members of the public evaluate, accept, or reject proposed rules. Recall that members of the public will make moral judgements

20 *Ibid.*, 250. (Emphasis original).

21 *Ibid.*, 254. For example, while it might be perfectly reasonable to spend five minutes deciding where to go out for dinner, this would be a woefully inadequate amount of time to spend deliberating over whether or not one should buy a house or keep renting. Further, the level of accuracy expected (in determining one’s finances, interest rates on mortgages, etc.), and the general quality of deliberation would likely be much higher in the latter case.

22 *Ibid.*, 257.

23 *Ibid.*, 233.

based on very different reasons, or evaluative standards; that is, standards by which members of the public judge different proposals. These evaluative standards are broad, but not entirely unrestricted; at the very least they must be “agreed to be intelligible as grounds for deliberating” by all members of the public.²⁴ This does not mean that they will be shared or endorsed by all, simply that it is not incoherent to consider or apply these standards when justifying a moral rule.²⁵ Even given this relatively weak requirement we can exclude those standards that are wholly unintelligible or irrelevant to the practice of social morality; for example, standards that “disvalue the very idea of morality”, or perversely “value immoral acts qua immoral acts”.²⁶ Gaus also introduces a modest principle of sincerity which states that when engaging in public reasoning we must offer arguments that we view as intelligible and relevant, even if we do not endorse them. That is, it is acceptable to attempt to convince another that rule R is justified using reasons held by this person, but not yourself, as long as you view those reasons as warranted for that person. In other words, the principle of sincerity demands that “we accept that the beliefs of the other are undefeated in her system and can see her deliberations and standards as intelligible”.²⁷ For example, an atheist need not be acting insincerely by appealing to religious reasons in an attempt to convince a Catholic that the rule she is proposing is justified, even though she may view her religious colleague as

²⁴ *Ibid.*, 280.

²⁵ *Ibid.* As Gaus notes, “the very idea of reasonable pluralism - a pluralism based on reasons - implies an *intelligible* pluralism.” (Emphasis own).

²⁶ *Ibid.*

²⁷ *Ibid.*, 292. There are two steps to Gaus's formulation of the principle of sincerity. When appealing to a reason that you do not hold, *R*, in public deliberation, you must (i) believe that others may “have sufficient reason to endorse [*R*]”, and (ii) you must be able to “see [*R*] as intelligible and relevant” even if you do not personally endorse it (*Ibid.*, 289).

ultimately mistaken. However, if she viewed all religious belief as fundamentally *incoherent* appealing to them would be insincere, since she would be treating the religious person as someone so completely wrongheaded in her thinking that she can only be manipulated into arriving at the “right” answer, instead of regarding her as a competent moral reasoner to be argued with and persuaded.²⁸

1.1.2 Restrictions on Proposed Rules

At this point we have a general idea of the attitude members of the public are supposed to display towards each other, but we have yet to say anything substantial about specific restrictions on the sorts of rules which can be proposed. Gaus lists seven different constraints on proposals: *Generality, Weak Publicity, Conflict Resolution and Claim Validation, Rules as Requirements, Universalizability as Reversibility, and A Modest Common Good Requirement*.²⁹ Most of these constraints are fairly straightforward, and two of them are not so much constraints as clarifications on the force, or moral weight, of these proposals;³⁰ but the last two warrant a brief explanation.

Universalizability as Reversibility is designed to counter a potential critique of public reason liberalism; namely, that if moral rules have social origins they cannot be said to be universally binding.³¹ Gaus argues that theories of social morality can avoid the charge of social relativism without invoking universalization as a constraint by stressing reversibility instead. That is, genuine moral proposals need not apply to an unrestricted

28 *Ibid.*, 291-2. Obvious examples of deception would also violate the principle of sincerity, such as pretending to share the reasons of the person you are attempting to persuade. That is, not just appealing to them as reasons that you view as reasonable (though you do not endorse them), but pretending that you do endorse them in your attempts at persuasion. In short, lying.

29 *Ibid.*, 294-303. (Section 15.2).

30 See 15.2 c. & d. *Conflict Resolution and Claim Validation, and Rules as Requirements*.

31 *Ibid.*, 299. Gaus is responding to Strawson here.

population (certain rules will apply only to parents or property owners, for example), they simply “must be universalizable in this crucial sense: a person’s advocacy must not depend on her knowledge that she will only occupy specific rules or positions”.³² This constraint functions similarly to Rawls’s veil of ignorance, but is broader in that it allows for individuals to reason based on different evaluative standards, and thereby to advance conflicting reversible proposals. These different proposals will be in equilibrium (i.e. stable or undefeated) if the proposer can affirm the rule while imagining herself subject to “all the different demands the rule could make on her.”³³ Conversely, if she cannot do this then the rule is not in equilibrium, since it is being put forth in an attempt to advantage certain roles or populations in society.

As for Gaus’s *Modest Common Good Requirement*, it is modest because it does not require that proposals maximize the good, rather, it holds that one cannot propose rules which are manifestly hostile to the good of some or all members of the public. Thus, the common good requirement is that each must have an “undefeated reason” to “believe that her proposal poses no threat to the good of any Member of the Public”.³⁴ Given the pluralistic nature of society what constitutes the good will be a contentious subject, but it is not overly idealistic to say that good-willed persons, such as Gaus’s members of the public, will come to agree upon some basic prerequisites necessary for a person to pursue

³² *Ibid.*, 300.

³³ *Ibid.*, 301. This does not require her to understand the evaluative standards of other members of the public, or imagine their reactions to the proposed rule, merely that she affirm the rule from her own standards in all possible situations where the rule could affect her.

³⁴ *Ibid.*, 303.

the good.³⁵ Thus, even this very modest common good requirement can rule out obviously corrupt or perverse moral rules; such as rules condoning slavery, for example.

With an account of the basic restrictions on proposals in place, we can turn to an account of how a shared set of rules can be generated, evaluated, and ranked. Given the large set of choices being deliberated on, it is unrealistic to expect individuals to be able to consider an entire set of rules directly.³⁶ Instead, members of the public will engage in preference ranking between pairs of proposals, and through this pairwise comparison generate a shared set of rules.³⁷ But, even certain pairwise rankings may be indeterminate, individuals may be wholly indifferent between two options. However, indifference does not necessarily imply inaction; one may rank both proposals equally while still preferring either rule over no rule at all. To explain, in cases of indifference the choice becomes between three options: x, y, and z(not x and not y). As long as (x,y) is preferable to z(no rule), a member of the public need not be trapped like Buridan's ass, she can simply pick one at random while endorsing both.³⁸

1.1.3 Blameless Liberty

Given the fact of deep pluralism, it is clear that members of the public will disagree on the optimal set of moral rules, but perhaps we can still say something about the range of proposals that they may find acceptable. Gaus points out that the authority of

35 Gaus offers basic liberties, bodily integrity, and access to basic material conditions as relatively uncontroversial prerequisites for the pursuit of the good.

36 *Ibid.*, 305. "...it is simply wrong that [members of the public] will always be able to generate a complete ordering of the set of proposals."

37 *Ibid.*, 304. Gaus stresses that preferences are not psychological states, preference ranking is simply a formal model for deliberative choices. That is, if "x is more choice worthy" than y, this merely means that x is preferred to y, not x is more choice worthy because it is preferred.

38 *Ibid.*, 308-9.

social morality has both costs and benefits, making it entirely reasonable to reject a particular proposal governing some aspect of social life; or go even further and hold that “no rule about this matter is called for”.³⁹ This is a case of what Hobbes called a “blameless liberty”, where a certain practice simply does not fall under social morality. One contentious case at present is whether or not smoking should be moralized, with some arguing that we have a blameless liberty to smoke, while others reject this claim.⁴⁰ But, blameless liberties are not wholly unrestricted, they operate within a protective perimeter of basic rights. Thus, even if you have a blameless liberty to Φ it does not hold if by Φ ing in a particular circumstance you violate the basic rights of another. To use our above example, you may not be free to exercise your blameless liberty to smoke (assuming there is one) when you are in an enclosed space with someone with respiratory problems, or perhaps in an enclosed space with any non-smoker, because this could physically harm them.⁴¹

Gaus argues that blameless liberty is the *default*, the burden of justification lies on the person claiming authority over another. This asymmetry of justification is “[f]undamental to seeing others as free and equal”, because to treat another as free and equal is to “lay no claim to moral authority over him - except that which he himself (as a Member of the Public) endorses”.⁴² That is, one is free to reject a socio-moral rule that one does not endorse, and act as if there is no rule at all, without justifying this rejection

39 *Ibid.*, 316.

40 This example becomes more complex in a country with socialized healthcare, since by smoking you may be putting a greater burden on the system. This, however, introduces a level of complexity that is not terribly important for present purposes.

41 *Ibid.*, 316-17.

42 *Ibid.*, 319.

to the person making the moral claim. Conversely, when making a moral claim on another one has to offer reasons why a moral imperative applies in this case, which that person (or at least a partially idealized version of that person) can accept. To illustrate this point, if Harrison claims that Don has an obligation to refrain from drinking while grading exams he must justify his claim and give Don reason to accept it.⁴³ If he does not do this to (partially idealized) Don's satisfaction then Harrison is effectively offering a personal norm instead of a justified moral rule. Don, however, can safely reject the rule “do not drink while marking” without offering reasons for his rejection which are shared by others (including Harrison), since he is not claiming moral authority over another. Conversely, under the symmetry thesis Don would be under an equal burden to defend his marking practice and to show that Harrison’s claim to moral authority “is ungrounded as [Harrison] is to show [Don] that it is well grounded”.⁴⁴ Further, if Don and Harrison cannot come to an agreement about whether or not there is a justified moral rule here they are stuck at a deliberative impasse, whereas under asymmetrical justification we would simply default to no rule at all - blameless liberty.⁴⁵

1.1.4 The Socially Optimal Eligible Set

Given the asymmetry of justification, we can begin to define the shared set of rules. A member of the public may reject the authority of a proposal based on her evaluative standards, thereby rendering the rule ineligible in her rankings. Judging a rule

43 Harrison's argument could be that drinking while marking exams makes Don less objective in his grading, and this violates a moral obligation to the students to be as objective as possible when marking their assignments.

44 *Ibid.*

45 Whether or not Gaus is correct in holding that blameless liberty is the default is a contentious issue, which he admits. We will return to this issue later when discussing the null set problem.

as ineligible essentially means that one lacks reasons to endorse this rule over no rule at all, that is, blameless liberty is preferable. Further, if any member of the public judges a rule to be ineligible, it also ineligible for the set of shared rules. Thus, we can define the *socially eligible* set as “all those proposals which are unanimously ranked by all Members of the Public as strictly preferred to blameless liberty”.⁴⁶ The socially eligible set can be narrowed by eliminating all eligible but non-optimal proposals; because, if all members of the public rank rule x over y, then legislating on the basis of y “would manifest a sort of collective irrationality”.⁴⁷ Thus, those eligible rules which are not superseded by other members of the set will comprise the socially *optimal eligible* set.⁴⁸

Now that we have defined the socially optimal eligible set, there are three possible outcomes in a pluralistic society: the set may be null, singleton, or maximal but indeterminate.⁴⁹ Gaus argues that given the desirability of converging upon a shared set of rules members of the public will be powerfully motivated to endorse a range of acceptable proposals, even if they are non-ideal under their own full set of evaluative standards. The importance of social morality is such that even if there is great disagreement over which *particular* rules should be followed, it is highly likely that there will be at least some proposals which are viewed by all as preferable to blameless liberty.⁵⁰ However, while it is plausible that members of the public will hold some set of

46 *Ibid.*, 322.

47 *Ibid.*, 323.

48 In this case rule x fulfills the same function as rule y, making it unnecessary; that is, rule y is not superior to rule x in any circumstance.

49 *Ibid.*

50 *Ibid.* This becomes more plausible if we keep in mind that these proposals are not wholly unrestricted, they are put forth by our reasonably good willed members of the public, and, as such, “[t]he proposals all

rules as preferable over no rule at all, Gaus stresses that if we take reasonable pluralism seriously “[t]here is no reason to suppose that, out of all this diversity, Members of the Public will converge on the *same* proposal”.⁵¹ In order for the optimal eligible set to be singleton all persons would have to reason to the same conclusion, which seems impossible given their differences in evaluative standards and moral sophistication. In essence, this would be to hold that public justification requires *consensus* among all members of the public, not simply *convergence*.⁵² Thus, we are left with “a maximal set of more than one proposal without an optimal element” as the only plausible outcome, according to Gaus.⁵³ This optimal eligible set will be indeterminate since there is no way to tell in advance which proposal will win out within a society; rather, the outcomes will be somewhat path-dependent. That is, the rules which become publicly justified will come from within the socially maximal set which all members of the public endorse over blameless liberty, but the particulars of this will depend on which ones are proposed first, how early these are endorsed, and other unpredictable factors.

1.2 Defeaters and the Null Set or Balkanization Dilemma

Successful convergence on a maximal set of rules becomes far less plausible, however, once Gaus introduces the concept of defeaters – principles or evaluative standards held by some members of the public which lead them to justifiably reject coercive rules. That is, even proposals put forward in good faith which pass all of the

seek to conform to the specified constraints, including being goodwilled attempts to meet the reversibility and common good requirements.”

51 *Ibid.*, 324. (Emphasis own).

52 Which, according to Gaus, goes against a fundamental commitment of public reason liberalism: addressing the problem of persistent fundamental disagreement among reasonable persons. See section 3.2. in Gaus & Vallier.

53 *Ibid.*

aforementioned constraints may be eliminated from the socially optimal eligible set by members of the public reasoning from private evaluative standards.⁵⁴ The worry here is that if a principle held by a single individual can prevent a proposal from being publicly justified (in other words can *defeat* it) then the likelihood of a diverse collection of people converging upon a set of shared rules becomes vanishingly small; even if these people are Gaus's somewhat reasonable and good-willed members of the public. Given a relatively low number of defeaters in our population, if two (or more) evaluative standards conflict on a particular issue, that area of social morality appears to be left unsettled; or if we follow Gaus in holding that justification is *asymmetrical* there will be no rule at all, merely blameless liberty. Thus, one may reject or defeat a proposal on the basis of private evaluative standards, but not appeal to them in order to justify a proposal to another.

To illustrate this point we can look to Gaus's analysis of the common good requirement and duties of assistance. While protection from basic harms is clearly justified by an appeal to the common good requirement of morality, Gaus denies that this justification can be extended to positive duties of assistance. This is because while “[r]ules against harms are part of all moral systems and are among the rules that children first recognize as necessary to social life”, there is great disagreement about whether or not we have a moral duty to prevent harm to others even when doing so involves a trivial cost to ourselves.⁵⁵ Gaus’s challenge to this seemingly uncontroversial duty of assistance

54 *Ibid.*, 336. See Gaus's third requirement for the argument from abstraction to be successful: “*the stability of abstract justification under full justification*”. See also, section 5 in Gaus and Vallier.

55 *Ibid.*, 362.

comes from the principle of desert, which has both a positive and negative aspect.⁵⁶ This is not to say that all those who highly value the principle of desert will be opposed to a duty of assistance, but as long as one member of the public holds desert as a *defeater* this is “sufficient reason to reject the right of assistance”, at least in the case of undeserving persons.⁵⁷ For example, a welfare system which provides for all persons including those who carelessly squander their resources, or are able but unwilling to work would be defeated by appealing to the principle of desert.

However, even if accept Gaus's claim that justification is asymmetrical, and thereby avoid the problem of indeterminacy and unjustified coercion, we are confronted by the null set problem. There remains a very real possibility that *all* proposals will be defeated by some evaluative standard; or, in a less extreme case, that there will be so few undefeated proposals left in the socially optimal eligible set that the members of the public will be left with an anemic and largely unworkable social morality (or, on a different level, set of laws to govern their society).

1.2.1 Nested Defeaters

Anticipating this problem, Gaus seeks to avoid the null set worry by proposing that in these cases of intractable disagreement certain individuals or populations may be exempt from an otherwise publicly justified coercive rule or law without defeating it for the polity as a whole. For example, while religious citizens may “block a public policy on

⁵⁶ *Ibid.*, 363. As Gaus puts it: “one can deserve benefits for contributing to a common good... [but] One can also deserve bad things...”.

⁵⁷ *Ibid.* Anticipating the objection that having desert as a defeater to the right to assistance fails the reversibility test since the member of the public who holds it “would claim the right of assistance even if she was undeserving” if she was in dire need of assistance; Gaus notes that this is an *empirical* claim about the nature of human beings and one that is surely not universally true. (See Gaus, 2012. 363-4).

religious grounds, it does not follow that others must do without the policy”.⁵⁸ In this way allowing individual members of the public to opt-out of those elements they find objectionable, while still widely converging upon a shared social morality, may avoid the null set problem. The challenge this presents is that it then becomes unclear whether or not we can claim that an overarching social morality exists at all. The worry becomes that the increasing balkanization of social morality leaves us with multiple “publics”, which face problems of socio-moral interaction similar to those that public reason liberalism was supposed to solve for individuals. Put differently, allowing nested defeaters in society may lead to a fracturing of the public; if one can opt out based on non-shared (private) evaluative standards then it becomes difficult for members of the public to know how to interact. The result is that we risk losing the main advantage of social morality – without consistent rules for moral interactions members of the public have no reliable way to know what claims they can justifiably make on their fellow citizens.⁵⁹

One might challenge this claim and argue that this is simply a necessary trade-off involved in being accepting of diversity; and, further, this is an accurate description of how people *actually* interact in a modern pluralistic democracy. We often do not know how we should act towards those who come from different backgrounds, and we sometimes have great difficulty communicating with persons from other cultural groups. Thus, perhaps this is a feature of Gaus's theory, not a problem for him to address.⁶⁰

58 Gaus, 2009. 23.

59 Of course members of the public could discuss their evaluative standards with each other before making any moral judgements or claims, but this defeats the purpose of social morality which is to provide guidance on social interaction *before* you know the person you are making a claim on.

60 Many thanks to Harrison Lee for pushing me on this point.

1.2.2 Balkanization

While initially plausible, this objection fails to take into account the severity of the social “fracturing” which Gaus's theory allows. It is certainly true that it is difficult to navigate the customs and expectations of different social, cultural, and religious groups in a diverse society, but learning how to do this is part of participating as a citizen in a multicultural community. In Canadian schools children are taught (with varying degrees of thoroughness) about different cultures and religions, and those who grow up in the more diverse parts of the nation learn to adjust their behaviour depending on the situation and who they are interacting with. Further, what is polite to some may be wholly inappropriate to others; for example, a thumbs up generally expresses approval in North America and Western Europe, but means “up-yours!” in much of the Middle East.⁶¹ Obviously this is a trivial example, but the point is that in order to interact with others in a pluralistic society without constant failures of communication we must be sensitive to difference and learn how to adapt to the situation. This is only possible if we are fairly successful in recognizing which behaviours or norms are applicable on a case-to-case basis. However, if *individuals*, let alone groups, are allowed to opt-out of certain elements of social morality it becomes highly implausible that members of the public will be able to consistently identify the relevant norms in a given situation with any semblance of accuracy. Further, this is more serious than a faux-pas, since applying a social-moral rule to one who does not endorse it is not just insulting, it is *unjust*. Of course in the case of a misapplied rule the subject may simply inform her fellow member

61 See: Desmond Morris, *Gestures: Their Origins and Distribution*. Jonathan Cape, London. 1979.

of the public that she does not endorse this rule, leading the would-be moralizer to recognize that his moral claim has been defeated. But, if these *failures* in moral application happen often enough then it becomes difficult to see how social morality provides any useful guidance for how diverse peoples living in a pluralistic society should interact.

Thus, it seems at this point that Gaus's concept of nested defeaters has merely complicated the issue, not solved it. We are left with a dilemma: either defeaters are non-nested, and apply universally to all members of the public, which makes it highly likely that the socially optimal eligible set will be null or anemic; or defeaters may be nested, in which case members of the public will lack consistent guidance in their moral interactions, essentially leaving the public without a functional social morality. Further, if these different publics are all interacting within the same society, then there must be some set of overarching rules which govern all the *nested* publics, and, consequently, all the members of the publics within them; and it is possible that this overarching or governing set may be null. One could argue that Gaus could accept these conclusions as a natural consequence of his theory, but this response is unsatisfying given that his aim is to develop a theory of social morality which explains real world interactions between diverse peoples in a modern pluralistic society (while also protecting the freedom and equality of persons). Thus, Gaus must give us a stronger reason to believe that his partially idealized members of the public will be able to converge on a usefully comprehensive set of moral rules.

Chapter 2

An Internal Critique of Public Reason Liberalism

Before addressing the practical issue of whether or not Gaus’s theory can generate actual convergence on a set of workable social-moral rules, we should first question the theoretical coherence of public reason liberalism. One potential worry is that Gaus’s theory relies on a highly controversial comprehensive doctrine, namely, his conception of freedom and equality of persons; and, further, his claim that respecting the full set of evaluative standards of one’s fellow members of the public is the *most* important value in society. However, if this value must be “lexically superior” to *all* other values for *every* member of the public, then this seems to contradict Gaus’s commitment to respecting the diversity of persons’ sets of evaluative standards in a modern pluralistic society.⁶²

However, in order to understand the internal critique of public reason liberalism it will be necessary to first explicate the original form of this argument which Thomas Christiano directed against what he calls Joshua Cohen’s “narrow” view of deliberative democracy.⁶³ To that end I will briefly present Cohen’s position and the “wide” versus “narrow” conceptions of deliberative democracy, before moving to explain Christiano’s critique, and, finally, applying this critique to Gaussian public reason.

2.1 Deliberative Democracy, Wide and Narrow

Theories of deliberative democracy “stress the importance of free and equal discussion and debate in a well functioning democratic process”, where citizens make

62 Christiano, 2009. 37.

63 This wide versus narrow distinction is Christiano's terminology, not Cohen's.

policy decisions on the basis of the *best* argument, not simply majority rule.⁶⁴ Having moral discussion and debate be *central* to justifying or legitimizing legislation in a democracy is “characteristic of what [Christiano] calls the *wide* view of deliberative democracy”.⁶⁵

This importance of deliberation and debate in political justification is reflected in Cohen's *idealized deliberative procedure* which aims to “provide a model characterization of free reasoning among equals, which can in turn serve as a model for arrangements of collective decision-making that are to establish a framework of free reasoning among equals”.⁶⁶ Working from this idealized theoretical model we can then start to determine the content of *actual* democratic institutions, that is, what sort of legislative procedures and constitutional rules are necessary to respect and promote the free and equal public reasoning of all citizens.

Further, “participants in the ideal deliberative procedure” are *free, equal, and reasonable*.⁶⁷ Citizens are *free* in that they are not required to adhere to any particular comprehensive doctrine. They recognize the fact of reasonable pluralism and may accept or reject any particular belief or philosophy of life without loss of rights, liberties, or status in society. They are *equal* in that everyone capable of rational deliberation “has and is recognized as having equal standing at each of the stages of the deliberative process”; differences in individual wealth or power have no bearing on one's ability to

64 Christiano, 2009. 1. (Though majority rule is still important in resolving persistent disagreements. More on this later).

65 *Ibid.*

66 Cohen, 1999. 396.

67 Christiano, 2009. 4. (In the *political* sense.)

participate in the democratic process.⁶⁸ Finally, citizens are *reasonable* in that they argue for their positions on the basis of “considerations that others, as free and equal, have *reasons to accept*, given the fact of reasonable pluralism and on the assumption that those others are themselves reasonable”.⁶⁹ This final principle of reasonableness is what makes his theory of deliberative democracy *narrow*, in Christiano's terminology, because Cohen restricts the reasons which are allowable in public deliberation to those which are *shared by all*.⁷⁰

It is important to clarify at this point what Cohen aims to accomplish with his theory. His version of deliberative democracy is designed to generate a *shared set* of acceptable principles or values which *all* citizens can endorse, principles which citizens may appeal to in arguing for or against various proposals in public debate. Admittedly, people may disagree on the ordering of said principles, but this can be resolved through majoritarian decision making because here the exercise of state power arises from “the *collective decisions* of the equal members of a society who are governed by that power”.⁷¹ That is, because these decisions are “supported by reasons that can be shared by the set of politically reasonable citizens over whom power is exercised”, decisions made on the basis of these principles respect the freedom and equality of persons.⁷² The idea here is not that collective decision making produces a comprehensive shared moral or ethical framework which constitutes the general will of the people, rather, the

68 Cohen, 1999. 397.

69 *Ibid.* (Emphasis original).

70 Christiano, 2009. 2.

71 Cohen, 1999. 399.

72 *Ibid.* For a coercive law to be justified those who are subject to it must find the values which provide the political bases for this law acceptable (though they may disagree with the particular details or formulation of said law).

requirement that the exercise of political power be justified by appealing *only* to reasons which are shared by those subject to it demonstrates that people are being treated as free and equal members of the state.⁷³ Further, restricting the set of considerations which ground political decisions to those which are shared by all protects against the problem of persistent minorities in democracies, since we are not simply counting the interests of a particular group while “keeping our fingers crossed that those interests are outweighed”.⁷⁴

With this understanding of what the principle of reasonableness is supposed to accomplish, we can turn to what exactly this term means. Terms of association or cooperation count as *reasonably acceptable* if they can be endorsed by citizens holding a variety of different comprehensive doctrines, that is, if accepting them is not dependent on any particular worldview or set of beliefs. Further, these terms are only acceptable if the considerations underpinning them are also compatible with the reasonable comprehensive doctrines of persons subject to said terms.⁷⁵ As for what constitutes a *reasonable comprehensive doctrine*, this is “a doctrine designed with a view to justifying terms of association on terms that others can reasonably accept”; that is, a doctrine is

⁷³ *Ibid.*, 404.

⁷⁴ *Ibid.* This is because all proposals or political decisions are made on the basis of reasons which can be endorsed by all. In the political realm the only sort of minority group which might get ignored is perhaps a group who shares an unusual ordering of the shared set of values. Cohen does not seem to consider this a problem, unlike Gaus.

⁷⁵ Christiano, 2009. 7-8. There are two levels of compatibility happening here: First, all citizens must be able to endorse the terms of association governing society (in Gaussean language, the set of rules being converged on); and second, all citizens must be able to accept the considerations or principles underpinning these terms, given their own reasonable comprehensive doctrines or beliefs (what Gaus would call their evaluative standards).

reasonable if it respects the fact of reasonable pluralism in society.⁷⁶ Further, a reasonable comprehensive doctrine must also meet a minimal standard of epistemic legitimacy in that it is “coherent, intelligible, and survives conscientious critical reflection”.⁷⁷ Cohen does not provide a more exact explanation of what he means by this, but this epistemic condition is supposed to be independent of any particular theory of knowledge. The general idea is that there are no *obvious* failures of reasoning involved, and we take the considerations underpinning these doctrines to be “genuine moral reasons” which apply universally to all persons.⁷⁸

Thus, Cohen's reasonability requirement is designed to generate consensus among reasonable persons “on *the* list of considerations that are relevant to the justification of terms of association”.⁷⁹ This, however, is not actual consensus among all persons in society, Cohen's theory only concerns citizens within society who fit the definition of reasonableness given above. Thus, even if seemingly reasonable persons in society cannot fully converge on a set of basic considerations this simply means that either some persons are acting unreasonably, or some reasonable persons hold false beliefs resulting from failures of reasoning.⁸⁰ Further, “[r]easonable persons may look for actual agreement among some unreasonable people as well”, in that the reasonable *parts* of an

⁷⁶ *Ibid.*, 8. For example, doctrines designed to either enforce a mandatory state religion, or eliminate all religion in political society, would be unreasonable since they would be unacceptable to the atheist and the person of faith, respectively.

⁷⁷ *Ibid.*, 9.

⁷⁸ Cohen, 1993. 283. Note: This may be somewhat analogous to Gaus's restrictions on evaluative standards, including his weak intelligibility requirement. See section 1.1.1: *Members of the public*.

⁷⁹ Christiano, 2009. 10. (Emphasis own). It is *the* rather than *a* list of considerations because there is only a single shared set of basic considerations (principles or values) which all citizens agree on.

⁸⁰ *Ibid.*, 10-11.

unreasonable persons view may be counted while excluding the unreasonable part.⁸¹ For example, we can respect and accommodate the unreasonable theist's concern for being able to freely practice her faith, but not her desire to have her religion become state-mandated (even if this is of great importance to her). In this way, only those parts of the unreasonable person's views which are shared by reasonable citizens are included, but they *are* counted – the unreasonable person is not wholly excluded from public debate and deliberation simply because she holds some views which reasonable persons cannot accept.⁸²

This, however, means that reasonable persons, “when proposing terms of association for the society, must refrain from justifying those terms on the basis of what they regard as the whole truth concerning matters of justice and political morality”.⁸³ That is, reasonable persons must argue in public deliberation and debate only on the basis of those beliefs which are compatible with the reasonable comprehensive doctrines of other reasonable people. Conversely, to appeal to one's *full set* of principles or beliefs would be unreasonable in the political context. It is this last point that Christiano targets in his critique; his question is “why must we refrain from proposing terms of association on the basis of reasons that we believe to be true or appropriate considerations but that we know to be incompatible with the reasonable comprehensive doctrines others accept?”⁸⁴

81 *Ibid.*, 10.

82 *Ibid.* This is one difference from Gaus who seems to think that we must exclude such persons from public deliberation altogether. Instead of treating them as rational moral agents to be reasoned with, we must view them as patients to be treated, dangers to be contained, or children to be educated. (See: Gaus, 2012. 283.)

83 *Ibid.*, 11.

84 *Ibid.*, 12.

2.2 Christiano's Argument Against the Principle of Reasonableness

Christiano holds that there is no good reason for imposing this level of restraint in public deliberation, and develops counterarguments to the three types of justifications given by Cohen for the importance of having a shared set of considerations underpinning democratic institutions: the argument from democracy, epistemological arguments, and the moral argument. While interesting, Christiano's first two attacks are directed against arguments concerning specific elements of the narrow view of deliberative democracy. His attack on Cohen's *moral* argument, however, may have wider implications for other theories of public reason, including Gaus's public reason liberalism. For this reason, I will focus on explicating Cohen's third argument and Christiano's response, before evaluating whether or not Christiano's critique applies to Gaus.

The moral argument, as presented by Christiano, proceeds in three steps. First, “everyone must respect each person's free exercise of her own reason.”⁸⁵ Second, respecting a person's free exercise of her own reason also involves respecting the products of that reason, specifically her reasonable comprehensive doctrines. Third, in order to accomplish the first two steps “one must not require her to live in ways that are incompatible with [her] reasonable comprehensive doctrines”.⁸⁶ However, one consequence of this argument is that in order to respect the free exercise of reason we may not force persons to live under terms of association that conflict with their own reasonable comprehensive doctrines “even if, objectively, reason tells us that those [doctrines] are mistaken” or “less epistemically reasonable than others [such as the ones

⁸⁵ *Ibid.*, 36.

⁸⁶ *Ibid.*

being proposed]”.⁸⁷ Moreover, this also implies that we are unable to advocate for, and live under, terms of association that we believe to be most reasonable or most defensible if these terms are incompatible with our fellow citizens reasonable doctrines, “even if we think those other reasonable doctrines are flawed”.⁸⁸ We must settle for those terms which are *acceptable*, not those which are *best*.

According to Christiano, the moral argument presents two fatal dilemmas. First, arguing from respect for reason “either implies a controversial comprehensive doctrine or it does not support the principle of reasonableness”; and, second, the moral argument “either implies a need for complete consensus or it fails to establish the principle of reasonableness”.⁸⁹

The idea in the first dilemma is that if respecting the free exercise of reasons requires us to suspend judgement about the epistemic reasonability of particular proposed doctrines during public deliberation and debate, then Cohen is presupposing a controversial comprehensive doctrine. Conversely, if we can include our judgements about the epistemic reasonableness of particular doctrines in justifying democratic institutions, then respect for the free exercise of reason does not support the principle of reasonableness. To explain, the principle of reasonableness is only justified if respect for the free exercise of reason overrides all other values; but, holding the free exercise of reason as the highest ranked value is itself highly controversial.⁹⁰

⁸⁷ *Ibid.* It is not entirely clear what Christiano means by “objectively” in this context since this discussion is not dependent on any particular epistemological understanding. Perhaps he simply means that these doctrines stand up better to careful scrutiny, or are the product of a more thorough reasoning process.

⁸⁸ *Ibid.*, 37.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

To clarify this point, if we do *not* hold the free exercise of reason as the highest value then in certain cases of conflict this value may be overruled by some other value or combination of values. But, if this value may be overruled when “the most epistemically reasonable conception of value implies the existence of a value [or set of values] greater than the free exercise of reason”, then, in certain circumstances, epistemic superiority should play a role in deciding how to “organize terms of association among those who hold these two conceptions”.⁹¹ In other words, if the value of the free exercise of reason does not *always* overrule all other values, then the principle of reasonableness is unsupported, and we ought to take epistemic reasonableness into account when engaging in public deliberation and debate.⁹²

Thus, to justify the principle of reasonableness we must hold that the value of the free exercise of reason is “lexically superior to all other values”; but, this is a highly controversial claim which will be unacceptable to many (perhaps most) reasonable persons.⁹³ Many moral systems hold other values to be higher than respect for reason, such as principles of pacifism, utility, or perfectionism. This is a problem for Cohen since his theory is supposedly based on terms which are acceptable to all reasonable persons, meaning that “an argument from the lexical priority of respect for reason to the principle

91 *Ibid.*, 38.

92 This may imply that we are no longer simply looking for *acceptable* terms of association, rather, we are seeking the *best* or *most just* terms of association.

93 *Ibid.* “Welfarist, contractarian and most rationalist views as well as many religious views reject [this claim]”.

of reasonableness would be self-defeating” since this value will be incompatible with many reasonable comprehensive doctrines.⁹⁴

The second horn of the dilemma now becomes apparent. Unless the free exercise of reason is lexically superior to all other values then there is no reason to refrain from including our judgements about the epistemic reasonableness of various doctrines when arguing for or against political proposals. “One may advance epistemically superior political proposals *even if some can reasonably reject them*”.⁹⁵ Thus, Cohen's moral argument for the principle of reasonableness fails. Either there are circumstances under which this principle gets overruled (because it does not trump all other values for all reasonable citizens); or it presupposes a highly controversial doctrine which is inadequate as a shared basis of justification (because all reasonable persons in society will not hold this value as lexically superior to all others). Put differently, “either respect for reason requires complete consensus within the society on basic principles of justice or is incompatible with the principle of reasonableness”.⁹⁶

Moreover, while Cohen argues that it is “disrespectful to dissenter's reason to impose those terms on them, which they reasonably reject” what he fails to see is that “by the same token, we must say that it is disrespectful” to require people to “forgo living in accordance with principles [they] reasonably [accept]”.⁹⁷ To clarify this point Christiano

94 *Ibid.*, 39. Christiano admits that Cohen could simply claim that those persons who do not hold respect for reason to be the highest value (lexically superior) are unreasonable, but this does little to solve the problem since Cohen is attempting to put forward a concept of reasonability which can accommodate diverse persons in a pluralistic society who subscribe to a variety of different moral views.

95 *Ibid.* (Emphasis own).

96 *Ibid.*, 40.

97 *Ibid.* That is, to be unable to live under terms of association that reflect one's full set of values or reasonable comprehensive doctrines.

discusses the example of deciding what principles or values should be taken into account during hiring processes. Tom may have good reason to believe that justice requires that “the most qualified person ought to be given the job”.⁹⁸ Whereas Josh (and others) may reject desert as an important consideration in this case, instead holding that jobs should be distributed purely on the basis of what produces the most efficient outcome, or perhaps the most utility in society as a whole. Tom, being a pragmatic person, agrees that we should take efficiency into account when organizing the workforce, but he does not think that this is the *sole* value involved. For Tom, efficiency should be weighted against desert, and he believes that any system of job distribution that does not take desert into account is fundamentally unjust. If Tom's proposal succeeds then Josh must live under terms of association that he reasonably rejects (since Josh does not value desert), but if Tom's “desert based proposals fail because a majority of others reasonably reject them, then [he] must live with terms” that he finds unjust.⁹⁹

In essence, Christiano's challenge to Cohen is that there is no reason to think that living under institutions that are based, in part, on some values that you reasonably reject is a greater offence to reason than living in a society that you find unjust. Respect for the free exercise of reason should apply *symmetrically*, meaning being prevented from being able to appeal to one's full set of values or principles in public deliberation is just as serious a restriction on the free exercise of one's reason as is being forced to live under terms of association grounded by principles one reasonably rejects. Thus, we are left at a *deliberative impasse*, either “one must impose on one terms that he does not accept or

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, 41.

one must require another to live under terms that he regards as fundamentally inadequate".¹⁰⁰ That is, there is no reason to think that respect for reason demands that we privilege the reasonable rejection of terms of association based on values we do not hold over the value of living in a society that conforms to one's full set of principles.

2.3 Applying Christiano's Challenge to Gaus

Before attempting to adapt the above argument to Gaussean public reason liberalism it is worth explaining why we should think that Christiano's critique of Cohen's *narrow* theory of deliberative democracy should have any force against Gaus. Whereas Cohen is concerned with finding a shared set of principles which all citizens in society can endorse as the proper grounds for political institutions, Gaus's theory operates at the level of individual socio-moral rules. Furthermore, Gaus finds *convergence* on a set of rules acceptable, and these rules are legitimate as long as all members of the public freely endorse them as preferable to blameless liberty; and they do *not* have to endorse them for the *same reasons* or even hold the same set of values as their fellows. Finally, Gaus also does not rely on a reasonability requirement, or any other type of strong restriction on the sorts of rules which can be proposed by members of the public (or the sorts of standards which can be appealed to when justifying proposals).¹⁰¹

That being said, the issues which Gaus's public reason liberalism addresses are strongly analogous to Cohen's theory of deliberative democracy. While Gaus primarily discusses socio-moral rules, he thinks that legal rules (laws) are converged upon and

¹⁰⁰ *Ibid.* 42.

¹⁰¹ Gaus does have certain weak restrictions on the types of things that count as evaluative standards (intelligible, relevant, etc.) and rules (reversible, modest common good requirement, etc.) but nothing as strong as Cohen's reasonability requirement. See Chapter I of this work for a more detailed discussion.

justified in much the same manner (though with some differences, such as the added steps of being codified and enforced by a central authority). Furthermore, we are focusing here only on Christiano's critique of the *moral* argument for the reasonability requirement, not Cohen's democratic and epistemic arguments. Since the argument under examination here concerns questions of what morality demands, in terms of how we should respect others as free and equal rational agents, there is good reason to think that Christiano's criticism should apply equally to a theory of social morality as it does to a theory of deliberative democracy.

Moving from Cohen's reasonability requirement to Gaussean public reason liberalism, we can apply Christiano's critique to Gaus's highly controversial claim that there exists a morally neutral baseline which is appealed to in cases where various principles (or their interpretations) conflict. Recall that, for Gaus, in cases where members of the public cannot all endorse some rule or set of rules because their evaluative standards conflict we default to no rule at all, blameless liberty; or at least default to the proposed rule which is most minimalist (if this is preferable to blameless liberty for all members of the public). However, this idea that respect for the freedom and equality of persons demands that we default to the most minimalist set of rules possible is itself highly controversial, since this assumes that all reasonable persons in society (or members of the public) will agree that maximizing liberty is lexically superior to all other values.¹⁰² Put in Gaussian terms, Christiano's challenge is that *if* it is unjust to force a

102 Christiano points out that holding “equality as the baseline or some notion of the common good or a harm principle” would be just as uncontroversial (which is to say it would be controversial) as holding the exercise of personal liberty as the highest value. (Christiano, 2009. 45).

member of the public to follow a rule which ignores her commitment to one of her private evaluative standards, *then* it is also unjust to force someone to give up a proposed rule on the basis of a standard which she does not share (Christiano does not think that either case is necessarily unacceptable, he is making a conditional claim about the consequences of accepting Gaus's argument). This argument appears to stem from the same concern that motivated Gaus to introduce the concept of nested defeaters, neither thinker wants a minority of defectors to be able to deny all members of the public a rule which they vehemently accept.

There is perhaps a useful analogy here between the argument Gaus gives against excluding private evaluative standards (such as religious reasons) from public reasoning and the argument Christiano gives for the importance of being able to live in a society that acknowledges and takes into account all of one's core beliefs. To explain, one of Gaus's criticisms of the consensus or shared reasons view of public justification is that it is objectionably exclusionary because "reasons that deeply religious citizens see as fundamental to political justice are ruled out of bounds as acceptable public reasons".¹⁰³ This is a major motivation for Gaus's advocacy for the asymmetry of justification and holding blameless liberty as a neutral baseline, since it allows members of the public to defeat coercive laws on the basis of private evaluative standards such as religious reasons; and thereby avoid being subject to coercive laws which they do not endorse.¹⁰⁴ Gaus is clearly concerned with religious persons being able to live in a society that

103 Gaus, 2009. 3. This is because all non-shared (private) evaluative standards are excluded from public reason. See also the discussion of convergence vs. Consensus justification in Ch. 1 of this work.

104 *Ibid.*, Section 5.1.

respects their core values and fundamental beliefs, under moral and legal rules which embody this respect. This seems to reflect a similar concern to that which motivates Christiano to claim that it is disrespectful to require a member of the public “to forego living in accordance with the whole truth as she sees it”.¹⁰⁵ Both Gaus and Christiano argue that members of the public should be allowed to live according to their full set of fundamental beliefs, they simply disagree about how this requirement should cash out in public deliberation.

However, at this point it does not appear that Christiano's critique of Cohen directly applies to Gaus's theory, at least not in the same way. To clarify, recall that Cohen's argument roughly proceeds as follows:

1. Everyone must respect each person's free exercise of her own reason.
2. Respecting a person's free exercise of her own reason also involves respecting the products of that reason, specifically her reasonable comprehensive doctrines.
3. One must not require her to live in ways that are incompatible with [her] reasonable comprehensive doctrines.

Compare with Gaus's argument:

1. Everyone must respect each person as free and equal.
2. Respecting persons as free and equal requires not holding them to rules they could reasonable reject, given their full set of evaluative standards (this is the blameless liberty baseline).

¹⁰⁵ Christiano, 2009. 40.

Prima facie, Gaus's argument avoids Christiano's critique since he does not restrict the set of reasons which persons can appeal to in public deliberation on the basis of a controversial comprehensive doctrine (or evaluative standard, value, principle, etc.).¹⁰⁶ However, in step two Gaus is positing blameless liberty as a unproblematic and universally accepted baseline, arguing that having to live under a rule which conflicts with one of your values is fundamentally disrespectful to reason, whereas having to live under a set of rules which you regard as inadequate is not. This is not nearly as uncontroversial as Gaus seems to think.

To illustrate this point we can return to Christiano's discussion of desert and efficiency to see how this differs from Gaus's reading of the principle of desert as a defeater for duties of assistance. Recall from the first chapter that Gaus claims that holding desert as an evaluative standard could give “sufficient reason to reject the right of assistance”.¹⁰⁷ But, as Christiano points out, the principle of desert may come into conflict with values such as efficiency, community, and many others, not just the common good requirement.¹⁰⁸ To clarify, the socio-moral rule being proposed might be something like weak duty of assistance (*A*): “all members of the public have an obligation to assist those in need if it poses little to no risk, and only minor inconvenience, to the person helping”.¹⁰⁹ However, a member of the public who holds desert as an evaluative standard could defeat *A* on the basis that it fails to take into account her commitment to

106 And thereby leading to a contradiction between the value of respecting the free exercise of reason and the principle of reasonability.

107 Gaus, 2012. 363. See also *Defeaters and the null set or balkanization dilemma* in Ch. 1 of this work.

108 Christiano, 2009. 41

109 Or, put more directly: “assist those in need if this action involves little to no risk, and only minor inconvenience”.

desert, and counter with rule *Ad* (assistance+desert), which adds the qualification that *A* only applies if the person being helped is somehow *deserving* of assistance.¹¹⁰ But, rule *Ad* may be unacceptable to those who do *not* hold desert as a relevant standard (perhaps because this moral evaluation step is less efficient in practice than a universal duty, or judging the worthiness of the person being helped goes against a religious commitment to care for the needy, etc.), leading them to reasonably reject *Ad* as unjust or overly restrictive. Thus, the public is left without a socio-moral rule concerning assistance.

In this way, Gaus argues, treating desert as a defeater settles this issue, since defaulting to blameless liberty means that no one is forced to follow a rule which they do not endorse. This seems correct, or at least unproblematic, when discussing a rather abstract duty of assistance such as the one given above – one might think one should donate to charity or give money to the homeless, but still accept that there is no socio-moral rule which states that all persons must fulfill this duty (or at least accept that reasonable persons may have intelligible justifications for why they do not accept this rule). However, let us take a more concrete duty of assistance, such as potential welfare systems: Harrison's commitment to desert defeats any universal (or undiscerning) duty of assistance, meaning that the only system of welfare that he will endorse is one which takes into account whether those receiving social assistance truly deserve help.

Conversely, Jesse is a member of the public who reasonably rejects the principle of desert (in this context) on the basis of his deeply held commitment to the value of community,

¹¹⁰ This could be interpreted in many different ways, for example the person being assisted must not have *caused* their current predicament, or they had no way to foresee that their actions would lead to the present troubles, and they legitimately require assistance and cannot simply “bootstrap” themselves out of their present problems, etc.

and, as such, views any appeal to the notion of desert when assisting others in need as completely unacceptable.¹¹¹ Thus, it seems that there are three potential outcomes: I: Jesse must endorse (and fund through taxation) a welfare system that goes against his fundamental beliefs; II: Harrison must endorse a welfare system that fails to take into account the principle of desert; or III: members of the public cannot agree on *any* universal system of welfare, and are forced to abandon the whole project in favour of individual or privatized aid organizations.¹¹² The relevant difference between the welfare example and the more abstract individual duty of assistance is that in the first case it makes sense to suspend judgement about whether or not this rule is justified and default to blameless liberty in order to resolve the controversy around this issue; but, in the second case this is more problematic since welfare systems are political matters, and “the society one lives in will satisfy one political commitment or another”.¹¹³

Gaus is now faced with a problem. In order to resolve conflicts between evaluative standards he proposes that we default to blameless liberty as a morally neutral baseline, but this is a highly controversial claim that many reasonable persons may not accept.¹¹⁴ To explain, assume (for the sake of argument) that all members of the public

111 Specifically, Jesse believes that withholding assistance from those deemed unworthy of help is fundamentally destructive to the community.

112 Gaus may very well accept the third option, but this is an outcome which goes against many peoples' intuitions about what should be provided for in a modern liberal democracy.

113 Christiano, 2009. Footnote 51. Christiano is responding to Gaus's idea in this footnote that politics and belief can be analogous, in that if we lack insufficient evidence to believe one way or another (or we lack sufficient reasons to choose one particular policy or rule) the neutral baseline is suspending judgement. Christiano argues that belief is disanalogous to politics in that choosing *not* to have a rule (or choosing the most minimalist one) is, in fact, a political decision that reflects a particular set of values.

114 Further, those who find blameless liberty abhorrent and value almost *any* rule higher than no rule at all will be forced to endorse proposals that they find highly lacking, whereas those who value rules less highly (such as those members of the public who share Gaus's idea that blameless liberty is a morally neutral baseline) will have their minimalist views privileged (since they can easily defeat more substantial rules).

desire *some* duty of assistance (or in this example a system of welfare), but disagree about what this should look like. Gaussean defeaters work very well at avoiding outcomes of type I, where a person is forced to live under a rule which goes against one of their fundamental beliefs; but doing so forces people to live under conditions which they regard as fundamentally inadequate or unjust, that is, outcomes II or III (denying them a rule which they consider extremely important, either by having no rule at all, or a rule which fails to take into account certain principles which they value very highly). The worry is that, at least in practice, Gaus is privileging those who value individual liberty and a minimalist set of rules over those who value living in a society with a more robust social morality (or laws and democratic institutions, at the state level). If so, this seems to go against his theory's commitment to accommodate persons holding a wide (and largely unrestricted) variety of values, principles, or evaluative standards.

However, without this baseline it seems impossible for Gaussean public reason to converge on a set of settled socio-moral rules, since there are so few restrictions on the sorts of principles or evaluative standards that members of the public can appeal to in public deliberation. Instead, social morality will be left largely unsettled. Thus, we can see that either Gaus keeps his commitment to this controversial baseline, thereby disrespecting the reason of some members of the public by forcing them to live under terms they find inadequate; or, he abandons this controversial doctrine, leaving Gaussean public reason with no mechanism to resolve conflicts between evaluative standards and settle contentious areas of social morality.

Admittedly, it is still open to Gaus to simply hold his ground and maintain that while blameless liberty is not a wholly uncontroversial baseline, it is *less* controversial than all other potential baselines since it avoids holding people to rules which they reasonably reject. True, some people will have to live under a system of rules which they find inadequate, but this is a necessary consequence of respecting the freedom and equality of persons, and it is a less serious violation of individual freedom than holding persons to rules which they find less acceptable than no rule at all (blameless liberty). The argument given above is not intended as a knock-down attack on the coherence of Gaus's argument, and, in this sense, he avoids the full force of Christiano's critique. However, it does demonstrate that Gaus's argument rests on a suspect premise (the asymmetry of justification and blameless liberty as a baseline) which many reasonable persons do not hold.

2.4 Practical Worries About Using Blameless Liberty as a Baseline

At this point it is clear that blameless liberty is a *controversial* baseline, but we have not yet demonstrated that it is an *unworkable* one. However, there are certain hard cases that cast doubt on the ability of Gaus's baseline to settle contentious areas of social morality. This is because even if we accept blameless liberty as a baseline there are certain areas of social morality (and law) where it is difficult to determine how to *interpret* this default position; and, if there are situations where different interpretations of blameless liberty conflict, then defaulting to blameless liberty may not suffice to settle that area of social morality or law.

2.4.1 The Problem of Children

One issue that may illustrate this potential problem is the difficulty in converging on a set of shared socio-moral rules concerning children's welfare. Children are not fully developed autonomous moral persons, and, thus, must have adults make certain decisions for them regarding their well-being. However, there is some disagreement about who should have authority over children's welfare, and how far this authority should extend. Traditionally a child's parents or guardians are treated as the appropriate decision makers, but the state places restrictions and guidelines on how the child should be treated. Many of these obligations are relatively uncontroversial: children must be fed, housed, and cared for; but there are other areas of parenting that do not produce such obvious consensus. For example, parents or legal guardians in most developed nations must ensure that their children achieve a certain level of state-approved education, whether that be through public or private schools or homeschooling. However, what the official curriculum should include (whether or not to teach sex education, for example) or how many years of education children should be required to complete, is under debate.

Furthermore, even issues concerning the healthcare of children can be contentious topics. There is a growing anti-vaccination movement in North America despite the potentially fatal consequences of children going unvaccinated, and the complete lack of scientific evidence supporting the fears of anti-vaccination advocates. Also, Jehovah's Witnesses may attempt to refuse blood transfusions for their children on religious grounds, often forcing the state to step in and overrule their wishes.¹¹⁵ In the case of

¹¹⁵ See *Prince v. Massachusetts*

blood transfusions the law is relatively clear with the U.S. Supreme Court ruling in *Prince v. Massachusetts* that “[p]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves...”.¹¹⁶ Thereby making it illegal for Jehovahs Witnesses to deny lifesaving treatment for their children, even though this conflicts with their fundamental religious beliefs. Thus, we can already see that parents and guardians are not *completely* free to make decisions for their children in all situations, even if they truly believe that they are doing what is best for them given their fundamental beliefs. Put in Gaussean terms, we might have a socio-moral rule that states all parents have a moral obligation to provide their children with the best medical treatment they can, at least in life-or-death situations.¹¹⁷ Whereas devout Jehovahs Witnesses might attempt to defeat this rule on the basis that certain necessary lifesaving treatments violate their religious beliefs.

There are a couple ways that we could interpret this restriction. The first is to make the claim that any parent who refuses lifesaving treatment for her child is acting unreasonably, and the principle or belief she is appealing to in rejecting this treatment is not a legitimate evaluative standard and thereby cannot *defeat* the duty to treat the child.¹¹⁸ If we take this position, however, this implies that the private standard which the

116 *Ibid.*

117 This gets more complicated when discussing long-term or preventative care, or if we take into account the fact that not all people have access to the best possible treatment (usually for financial reasons).

118 Gaus gives an intelligibility requirement for what counts as legitimate evaluative standards, where as long as they can be interpreted “as providing reasons for the evaluation of moral rules” they are acceptable

parent is appealing to is incoherent or irrelevant to public deliberation about moral rules *in general*. However, this claim is too strong because, for Gaus, people who publicly appeal to *unintelligible* standards must be excluded from public deliberation and debate, and instead viewed as patients to be treated, dangers to be contained, or children to be educated.¹¹⁹ This does not mean that we cannot judge Jehovah's Witnesses to be *mistaken* in rejecting treatment based on religious beliefs, just not wholly unintelligible or unreasonable (we must still view them as reasonable moral persons, acting on the basis of intelligible principles or values).

A more plausible interpretation of this situation is that two (or more) principles or values are in conflict. In this case, what is judged by the parent to be spiritually best for the child, given her religious beliefs, conflicts with what is best for the child's physical well-being. This is a question which is too important to be left unsettled, so one possible resolution is that we default to protecting the child's health, since children are incapable of making informed decisions about rejecting treatment on the basis of settled fundamental religious (or secular) beliefs. That is, we cannot know what the child's religious beliefs will be as an adult, whereas we *can* know what is medically best for the child right now.¹²⁰ In essence, the religious evaluative standard fails to defeat the obligation to prevent harm to the child because this exercise of religious freedom is blocked (or defeated) by concerns for the child's well being. However, it is unlikely that

in public reasoning. (Gaus, 2012. 280). Also recall the discussion of evaluative standards and the reasons one has in Ch. 1. of this work.

119 Gaus, 2012. 282.

120 Perhaps it would be better to phrase this as defaulting to uncontroversial or shared standards. In this case even though there is disagreement on matters of faith, all parties hold that the health of a child is important.

Gaus can accept this outcome since he is committed to the idea that when evaluative standards conflict we simply have no rule at all. He may still argue for blameless liberty in this situation since to do otherwise would mean forcing parents to be subject to rules which they reasonably reject, an outcome which goes against the intuitions of many reasonable persons (as well as current laws in many democratic nations). Thus, this conflict between evaluative standards is not resolved by a simple appeal to blameless liberty as a *uncontroversial baseline*, defaulting to blameless liberty is highly controversial in this context.

One could argue that in this case we have found the *limits* of a parent's blameless liberty, since the decisions of a parent or guardian directly affect the lives of others this liberty is not truly *blameless*.¹²¹ But, this raises a problem for Gaus; the issue here is not that there will be conflicting judgements about how children should be raised (a trivial and obvious point), rather, that there will be different interpretations of what it means to hold blameless liberty as a baseline when generating the set of moral or legal rules regarding the treatment of children. We must have coercive rules governing children because they cannot be trusted to act in their own best interest under blameless liberty; meaning mature moral persons must make these decisions for them. However, there will be persistent fundamental disagreement between members of the public about what sorts of rules should be enacted to protect children's welfare. Devout members of the public may attempt to reject certain medical treatments for their children on religious grounds,

121 To explain, parents do not possess completely *unrestricted* freedom to act as they see fit in raising their children. There are certain limits to how much control parents have over their children (the minimum would be basic human rights: cannot be starved, tortured, etc.).

effectively “defeating” coercive rules that state they have to (for example) immunize their children before enrolling them in public schools, or accept lifesaving blood transfusions for their child. But, this is not a clear case of blameless liberty where we should default to the parent's freedom to act as they wish in raising their children, since the children also have certain rights and interests (even though, up to a certain age, they cannot properly advocate for themselves). Thus, in some situations the state may be forced to step in to protect a child's welfare, even if this directly conflicts with the wishes of the parent.

There are other situations where different interpretations of a single principle or value may conflict. To illustrate this point let us return to our fictional members of the public Harrison and Don. Suppose Harrison proposes the rule V which states “all children must be vaccinated against measles, mumps, and rubella (MMR) before being enrolled in public school.” Don, however, rejects V because he has heard of the Wakefield controversy and he believes that the MMR vaccine may be harmful to his child. If Don successfully *defeats* the proposed rule then supposedly we are left with no rule at all regarding the immunization of children, Don is free to vaccinate or not vaccinate his child before sending him to school.

Harrison may counter that Don does not have blameless liberty in this situation since this is an issue concerning children's welfare, but, Don is *also* acting out of concern for the health of his child. Both parties are appealing to children's welfare, they just differ in their judgements about the safety of the MMR vaccine. If Don's defeater fails he is subject to a coercive rule stating he must vaccinate his child before taking advantage of the public school system – which goes against a core commitment of Gaus's public

reason liberalism.¹²² Conversely, if Don successfully defeats the rule then Harrison's children are denied a (relatively) safe and disease-free educational environment.¹²³ Gaus could respond that there is a difference of kind here; in the former case Don is being unjustly coerced, whereas in the latter Harrison is not, he is just not being provided with a particular service. However, there are two features to this case which make this response somewhat unsatisfactory. First, the rule about vaccination regards children, not adults. Both Harrison and Don are judging what is best for another, so the rule will be coercive to the child in either case (coerced into getting vaccinated, or into attending school without being immunized). Second, if we allow Don's Wakefield-based concerns to defeat the vaccine rule, then we are in some sense privileging his judgement about what is medically best by allowing him to defeat the rule for all; this is because immunization is only fully effective if enough people are vaccinated to provide herd immunity, so by “opting out” you are endangering not just yourself (or your own child), but the whole community.

Of course this in no way prevents Harrison from vaccinating his own children, but it does deny him (and others) from providing his children with what he believes to be the best protection against serious illness and death from infection. Again, Gaus could counter that both parents have the liberty to do what is best for their own children, as long as the exercise of this liberty does not infringe on the freedom of others, but it is not

122 Gaus could simply counter that the problem here is that we have a public school system at all, and Don is free to send his children to private schools that lack this requirement, or homeschool them. This issue becomes more problematic when we think about what other public resources his children might justifiably be denied the use of in the interest of public safety.

123 Harrison's children are being denied the advantage of herd immunity because this is being undermined by Don's (and others') unvaccinated children.

immediately obvious why preventing Don from entering his unvaccinated child into public school is a more serious restriction on his freedom than denying Harrison access to an environment protected by herd-immunity for his children.¹²⁴

How Gaus resolves the issue of children's welfare will have wider implications for all coercive rules concerning the treatment of those who may have certain rights or interests, but are unable to make decisions for themselves; such as the mentally infirm or, according to some, certain higher animals. The general problem here is that asymmetrical justification does not always provide clear guidance when attempting to generate a shared set of rules about the treatment of those who cannot properly advocate for themselves since it is not obvious whose judgement we should defer to in these situations, or what interpretation of the blameless liberty baseline should be upheld.¹²⁵

Finally, Gaus may attempt to appeal to the idea of nested defeaters in the certain cases of children's welfare, (for example, having children be exempted from school dress codes, or sex education for religious reasons) but this once again raises the problem of balkanization. If parents are allowed to exempt their children from certain elements of social morality, or education, or public health, this will likely result in the same sort of social “fracturing” that would occur between adult members of the public. Even more worrying, if children are raised in nested publics exempt from certain social-moral rules

124 This is a very oversimplified portrayal of how herd immunity works, but the idea here is that if there are enough “Dons” then herd immunity will be weakened. This is a separate issue from the free-rider problem, which Gaus acknowledges in (Gaus, 2009. 22), since the primary concern here is not that parents will attempt to cheat the system.

125 We can already see this in the examples discussed above. In the case of Jehovah's Witnesses denying blood transfusions to their children the state usually steps in and overrules their decision, but in the case of immunizing one's children the law may differ from state to state (United States) or province to province (Canada). See Diekema, 2005.

they will likely have great difficulty in interacting with, or integrating into, the wider public if they wish to do so as adults.¹²⁶ Moreover, certain cases such as the immunization example are problematic because opting out of certain coercive rules denies others the benefit of the rule, which is the *exact problem* which Gaus's concept of nested defeaters is supposed to avoid. It is these problematic cases concerning public goods which we will turn to next.

2.4.2 Broader Implications for Issues of Public Good

Recall that Gaussian defeaters, whether nested or universal, are designed to serve two functions: I. they allow members of the public to reject or opt out of coercive rules which they cannot endorse; and II. they prevent social morality from being indeterminate (by defaulting to blameless liberty instead of leaving that area of social morality unsettled). As argued in the first chapter, the consequences of solving (I) through defeaters are highly undesirable, namely the null-set and balkanization dilemma. Now, after reviewing the above examples, it has become doubtful whether or not defeaters can accomplish this second function either.

Furthermore, this failure to settle social morality goes beyond rules concerning vulnerable populations (such as the children's welfare example). There are many other cases where blameless liberty is intuitively problematic, and neither balkanization nor indeterminate social morality are acceptable outcomes. The general form of these

126 The concern here is that being raised in a “public” which deliberately separates itself from certain aspects of social morality shared by society more generally will result in children being “locked in” by their parents decisions, preventing them from making free decisions about their own lives as adults. This worry is one reason why there are laws about the minimum education of children. Obviously this is a problem in any society, but it becomes especially severe when parents are allowed to remove themselves and their children from those social-moral rules which conflict with their fundamental beliefs.

problematic cases is as follows: There is some public good P which requires the cooperation of a significant majority of the public in order for it to obtain or remain stable; or, put negatively, if enough dissenting X's opt out of P this undermines P, denying this good for all members of the public not just the dissenters. But, X reasonably rejects P on the basis of some evaluative standard which she thinks is important enough to outweigh the deleterious effects of losing P. To clarify this point, we can look at two different examples that fit this model; issues of public health and environmental degradation.

One of the clearest examples of these problematic cases is the one which has already been discussed, vaccination. Beyond the issue of deciding for children, immunity is a public good which can only be achieved and maintained through the participation of the vast majority of the population; with the herd immunity threshold (the percentage of immunization in the population required to prevent further spread of the disease in the event of an outbreak) ranging from 75-94%, depending on the disease.¹²⁷ Even if only a small percentage of the population are unvaccinated this can undermine herd immunity for all. This is exacerbated by the fact that there are those who cannot get immunized for medical reasons, (persons who are immunocompromised or have egg allergies) and must rely on herd immunity for protection from infectious diseases.¹²⁸ Thus, refusing vaccination (or rejecting a mandatory vaccination policy) on the basis of non-medical reasons poses a very real threat to the entire population. In particular, anti-vaccination

127 "History and Epidemiology of Global Smallpox Eradication". Slide 16-17

128 Not all vaccines contain egg proteins, but certain vaccines made using chicken embryos do pose this risk.

movements such as the one spurred by Andrew Wakefield's fraudulent paper linking the MMR vaccine to autism, or various campaigns against the diphtheria-tetanus-pertussis (DTP) vaccine in Europe and the United States, have led to outbreaks of diseases which had previously been almost wholly eliminated in most developed nations by the late 20th and early 21st centuries.¹²⁹

The problem here is that this is a case where defeating a rule requiring mandatory vaccination (whether universal, or just for children entering public school, or health professionals, or people working in other high-exposure areas), denies the entire population a public good on the basis of private evaluative standards. Even if the vaccination rule V is not defeated for all, but only a certain population who rejects it on religious or ideological grounds, this still weakens the overall protection of herd immunity, and thereby denies all persons the benefits gained by endorsing V . Clearly balkanization is not a solution, but neither is leaving this area unsettled or having no rule at all, since it is unclear whether or not one should have a blameless liberty to act in a way that threatens the health of others (in addition to yourself).

Gaus could respond to this particular example in a couple different ways. First, he could claim that those who reject V on the basis of pseudoscience or unsupported fears are acting unreasonably and irrationally, and, as such, the evaluative standard they are appealing to fails to defeat V . For example, a member of the public cannot defeat a rule requiring her children to get the MMR vaccine by claiming that the increased risk of autism outweighs the benefit of being protected against measles, mumps, and rubella,

129 Gangarosa EJ, Galazka AM, Wolfe CR *et al.* 1998.

since this is a clear case of faulty reasoning that could be corrected for by Gaus's moderately idealized members of the public.¹³⁰ It is quite plausible that if the relevant science was understood by these members of the public they would judge the benefits of vaccination to vastly outweigh the risks.¹³¹

However, while this response may work in cases of a clear scientific misunderstanding it is less useful when discussing religious objections to vaccination. If a member of the public rejects vaccination because it conflicts with her religious faith then this is not a simple failure of reasoning which could (theoretically) be corrected through rational argument. These evaluative standards are part of her fundamental belief system, and labelling them as “incoherent” or “irrelevant” to public deliberation about moral rules would be unjustly exclusionary towards religious reasons, a point which Gaus has argued at great length.¹³²

An alternative response is to simply hold that this is a blameless liberty, and while the issue may be somewhat complicated in the case of vaccinating children, adult members of the public can freely reject V on the basis of any private evaluative standard. Certainly all members of the public should be free to have full control over their own healthcare, including whether or not they get vaccinated, but possessing blameless liberty over one's own body does not imply that one has the blameless liberty to act as a vector

130 Put differently, we could say that the “Wakefield” evaluative standard W is incoherent or irrelevant to public deliberation about moral rules.

131 Part of the reason why anti-vaccination movements have sprung up in modern developed nations is that “[...] once high vaccine uptake and herd immunity are attained, perceived vaccine risks tend to deter individuals from being vaccinated. The result is a lowering of vaccine uptake, contrary to the community's common interest in maintaining high numbers of immunised individuals.” (Gangarosa, 1998. 360).

132 Admittedly, there are some scientists and philosophers who hold this exact view. but Gaus very clearly argues against the views of those like Steve Macedo who wish to exclude religious reasons from public reason entirely. (Gaus, 2009. 2).

for disease in crowded public spaces. It seems entirely reasonable to restrict those who are not immunized from certain areas of society if they pose a threat to public health (preventing unvaccinated children from attending public school, or requiring that those who work in the healthcare system or armed forces get vaccinated, for example). Much in the same way that smoking is banned from many public spaces due to potential harm, perhaps unvaccinated persons should be similarly restricted. Obviously this is a bit hyperbolic, but the point is that once again we are left with a case of conflicting evaluative standards over an issue which is neither settled through an appeal to blameless liberty nor balkanization.¹³³

Turning now to our second example, we can look at the much broader issue of environmental degradation. Social-moral rules or laws surrounding pollution are necessary to a well-functioning society even if only in the most basic form of not dumping waste onto another person's property. In modern industrialized society this issue becomes vastly more important and far more complex, with governments having to regulate industrial and agricultural waste as well as air pollution, in addition to more general laws concerning individual disposal of trash (private dumping and littering bylaws for example). As has become abundantly clear through the continuing conflict between industry and environmental protection agencies, different groups and individuals will rank the value of an unpolluted environment differently; with some holding this to be

133 Obviously there are many other public health issues such as proper sanitation and waste disposal, but I have focused on the immunization example because the issue here is somewhat simpler, and defectors are an ongoing problem even in developed nations (conversely, there is no current problem with people in Canada actively refusing to participate in the public sanitation system).

of utmost importance, while others view the environment as little more than a resource to be exploited.

There are some environmental issues which may (arguably) be resolved through privatization and self-policing. In a closed system those who benefit from a renewable resource have a vested interest in maintaining the health of that ecosystem. The Maine lobster fishery is an excellent example of this, where most modern conservation efforts have come from the lobstermen themselves, not government regulation, but, there are many other environmental issues that cannot be resolved in this way.¹³⁴ Especially problematic cases for Gaus are those involving the pollution of large-scale natural environments, such as ocean acidification, ozone depletion, and global warming. Global warming is perhaps the clearest example of this type, since anthropocentric global warming affects all people on Earth, and it is a problem which cannot be solved (or even effectively mitigated) without the cooperation of all.

Putting aside for the moment the issue of international cooperation, it is difficult to see how Gaus's theory can accommodate environmental problems of this type. Rules or laws concerning air pollution and greenhouse gases are necessary for the continued health of the planet, but there are many members of the public who would opt-out or defeat coercive rules of this type, (perhaps on the basis of economic principles). Further, not all those who reject rules regulating pollution do so out of self-interest (industries saving money on air scrubbers for example), or a lack of scientific understanding (climate change denial), there are also religious objections from those who believe that “it is

¹³⁴ Archeson, 2003.

hubris to think that human beings could disrupt something that God created”.¹³⁵ Just as in the immunization example we are presented with an area of social morality or law that must be settled, but is solvable neither through balkanization nor blameless liberty.

At this point we can see that Gaussean public reason liberalism is deeply problematic, both on a theoretical and a practical level. By making as few moral demands on people as possible Gaus respects the freedom and equality of persons insofar as they are not subject to any socio moral rules which they cannot freely endorse given their full set of evaluative standards. But, in doing so he ends up positing a highly controversial baseline (blameless liberty) which is, thus, questionable as a solution to theoretical disagreement between conflicting principles. Further, this baseline is inadequate on a practical level since it provides no clear guidance in resolving certain areas of unsettled social morality due to conflicting differences in its interpretation.

135 Kaufman, 2010.

Chapter 3

Alternative Approaches to Treating Persons as Free and Equal

This chapter will attempt to adjudicate between various ways of realizing the free and equal ideal, in particular focusing on comparing Gaussean public reason liberalism to Arneson's protective account. I will argue that while Arneson's theory gives a strong instrumentalist argument for the value of democratic rights in treating people as free and equal, this does not fully capture the free and equal ideal, as he fails to account for the intrinsic value in having one's values being represented in the society one lives within, and being a participant in public deliberation over the rules that one is subject to.

At this point we have various possible interpretations of the free and equal ideal, with Gaus, Christiano, and Cohen each arguing for what they see as the most plausible way this ideal should unfold in a modern pluralistic society. In particular, the focus of this work so far has been examining different ways of respecting the freedom and equality of persons while also organizing social interactions through a system of socio-moral rules or laws. Cohen argues that in order to treat persons as free and equal they need to be able to endorse a shared set of *principles* which underlie the rules or laws of society; this is where his principle of restraint comes in. Rejecting Cohen's principle of restraint, Christiano argues that justice demands both the equal advancement of persons interests, and also the *public realization* of this equality.¹³⁶ Further, because of pervasive disagreement about fundamental issues such as justice and the common good, democratic

¹³⁶ Christiano, 2008. 75.

decision-making is the unique way of realizing public equality since it “enables us all to see that we are being treated as equals despite disagreements”, making democracy *intrinsically just*.¹³⁷

Taking a different tack, Gaus argues that the free and equal ideal involves ensuring that all members of the public can freely endorse the full set of rules they are subject to, and defeat or opt-out of any coercive rules which conflict with their fundamental beliefs or evaluative standards. However, as discussed in previous chapters, Gaus's theory primarily concerns social morality more generally, not political authority. For Gaus, democracy plays a somewhat complicated role in respecting the freedom and equality of persons. He argues that democratic decision-making procedures are valued partially because they are uniquely “responsive to the judgements of the citizenry [which makes them] reliable protectors of basic individual rights”.¹³⁸ But, democratic rights are not valuable simply because they tend to produce good outcomes and protect basic individual rights, they are *necessary* to publicly resolve conflicts about social morality between members of the public in a non-authoritarian manner, thereby treating others as free and equal moral agents.¹³⁹ However, for Gaus, “public reason does not mandate a specific democratic regime” or “support political authority over informal social authority”, it plays the role of gap-filler between socio-moral rules and law.¹⁴⁰ Political authority evolves out of socio-moral authority, with the set of acceptable political

¹³⁷ *Ibid.*, 76.

¹³⁸ Gaus, 2011. 452. It is possible that a non-democratic regime could respect civil rights, but in our present world we have no evidence of this being possible.

¹³⁹ *Ibid.*, 454. Non-authoritarian because all members of a public get to take part in the public deliberation process and bring their full set of evaluative standards to bear.

¹⁴⁰ *Ibid.*, 455.

systems being restricted to democratic ones, since only these are capable of protecting the rights of all, and are acceptable to all reasonable members of the public.¹⁴¹

Despite the differences in their respective theories, Christiano, Cohen, and Gaus all subscribe to the idea of the intrinsic worth of democracy. They argue for *procedural* solutions to treating persons as free and equal moral agents (narrow in Cohen's case, wide in the theories of Christiano and Gaus). That is, as long as the proper steps are followed in converging on a set of socio-moral rules (Gaus) or generating a set of shared principles (Cohen), the outcomes will be just, and the freedom and equality of persons is respected.

So far this work has discussed the theoretical and practical issues with procedural approaches to democracy, but there are also non-procedural or instrumentalist theories of democracy which offer an alternative way of treating persons as free and equal. One prominent instrumentalist is Richard Arneson; he argues that treating persons as free and equal simply involves treating them in accordance with independent objective moral standards, which we attempt to discover within a society through careful reflection and the work of moral experts and are willing to modify when new evidence arises. Theoretically this goal could be accomplished under any sort of political system or societal arrangement, it just so happens that substantive constitutional democracies have historically produced better outcomes than any other system so far.¹⁴²

141 *Ibid.*, 454-5. Recall, for Gaus majoritarian decision-making does not resolve conflicts between members of the public over fundamental issues, or justify a rule. All members of the public must endorse a rule, or set of rules, for them to be justified.

142 Implying that this too is conditional on our present evidence, and subject to change given new social or technological developments.

3.1 Richard Arneson on the Merely Instrumental Worth of Democracy

Arneson argues that democratic rights are inherently protective, in that their “primary function is to safeguard other, more fundamental rights”.¹⁴³ Further, the only way to *justify* democratic rights is to demonstrate that they “serve this function better than do alternative feasible arrangements”.¹⁴⁴ This is because Arneson follows a very different method than Cohen, Gaus, or Christiano. Instead of seeking to justify rules to members of the public by ensuring that the selection process allows them to endorse or reject proposed coercive rules (or the principles underpinning them) by appealing to their full set (or in Cohen's case the shared set) of comprehensive beliefs or evaluative standards, Arneson holds that any “exercise of power of one person over another” is only justified if it is in that person's *best interest*, or insofar that it advances her fundamental rights.¹⁴⁵ Thus, processes for generating a set of socio-moral rules or laws should be evaluated on wholly consequentialist terms, where democratic decision-making systems are *inherently* no better than non-democratic alternatives.¹⁴⁶ Building on this Arneson develops what he calls “the *protective account* of democratic rights”, which argues that the most compelling justification for supporting modern constitutional democracies is that they tend to protect fundamental rights better than any other feasible political system.¹⁴⁷

Democratic rights, in this context, are understood as those rights held by all persons in society to participate equally in the decision-making process. These include

143 Arneson, 95.

144 *Ibid.* (Such as monarchy, oligarchy, etc.).

145 Christiano, 2003. 9.

146 That is, democratic institutions do not inherently respect the fundamental rights of persons (freedom and equality included) any better than, for example, a Platonic dictatorship.

147 Arneson, 96. (Emphasis own).

the right to vote and run for public office in free elections decided by some sort of majority-rule procedure (direct or representational). This definition is fairly open to interpretation, but, for Arneson's purposes, a rough understanding should suffice. The fundamental rights that democratic rights are supposed to protect “are conceived as requirements of justice”, and include such rights as freedom of speech, privacy, and individual liberty, as well as “egalitarian rights to material resources”.¹⁴⁸ Arneson is quick to stress that the arguments he gives for his protective account are independent of any particular conception of fundamental rights, since the central idea here is that democratic rights are only valuable insofar as they protect fundamental rights, whatever these may be. Further, we can also be open to the idea that we may be mistaken in our beliefs about the content of these fundamental rights, and about what procedural rights should be accorded. Thus, under the protective account our understanding of the set of fundamental rights (and our judgements about the particular democratic rights which protect them) is provisional.

With these rough definitions in place we can proceed to Arneson's main claim: namely, that “the protective account of democratic rights provides the most natural and compelling justification of political regimes of substantive constitutional democracy under modern conditions”.¹⁴⁹ Here, *constitutional democracy* is understood as “a regime run according to principles of democratic governance” which is limited or qualified by a constitution which protects certain individual rights of citizens, rights which are

148 *Ibid.*, 95. By “egalitarian rights to material resources” Arneson has something in mind like the distribution of goods implied by Rawl's difference principle, or Dworkin's principle of equality of resources (*Ibid.*).

149 *Ibid.*, 96.

“enforced by nonelected judges holding final powers of review”.¹⁵⁰ Further, a constitutional democracy is *substantive* if some of the individual rights which the constitution protects are justified on *moral* grounds, as opposed to simply being democracy-enhancing.¹⁵¹ Arneson takes a regime's commitment to substantive constitutional rights to be a sign that the protective account provides the underlying justification for democratic rights in general, since otherwise it is difficult to explain why majoritarian decision-making in a democracy can be curtailed or limited by a constitution at all.

Further, Arneson argues that the protective account provides the only possible justification for enforcing the democratic rights of citizens to vote in elections to pick political rulers and, indirectly, laws. This is because voting is an exercise of power over one's fellow citizens, and no one has the right to exercise of power over another without first obtaining the *consent* of all those affected.¹⁵² That is, “unless such exercise of power best promotes fulfillment of the fundamental rights of the people over whom power is exercised together with one's own fundamental rights.”¹⁵³ This is somewhat analogous to

150 *Ibid.*

151 *Ibid.* A “democracy-enhancing” right would be an individual right designed to protect the democratic character of a regime over time, for example, by enforcing individual rights which “limit majority rule in order to preserve or enhance the genuinely majority-rule character of the political order” (*Ibid.*).

152 Arneson seems to think this is a practical impossibility in a modern democracy. Conversely, explaining how this *is possible* is Gaus's fundamental project. Arneson neglects to give a strong argument for *why* it is impossible to obtain universal consent from reasonable citizens, but others such as Ronald Dworkin have argued that “the sheer complexity of decision making in the democratic state is incompatible with the realization of intrinsic fairness”, and, as such, democratic institutions should be evaluated solely on the basis of the outcomes they produce (Christiano, 2003. 9). Dworkin gives a detailed argument for how, exactly, the ideal of equality should be understood in political systems, arguing that it is best understood as a collective responsibility that all citizens aim to realize, not an individual right to be protected, or resource to be divided equally. But, he does not explicitly address the issue of whether or not it is possible for all citizens to consent to the set of rules which they are subject to (See: Dworkin, 1987. in Christiano, 2003. p.116-137).

153 *Ibid.*, 97.

the right parents have to exercise power over their children. Parents are allowed to employ wide discretionary authority over the care of their offspring because, in general, this has proven to be “a good way of bringing it about that each child's right to a decent upbringing is secured”.¹⁵⁴ However, this right only holds as long as a parent is protecting her children's fundamental rights. When there is evidence that parents are abusing their children, or even if there is good evidence that a parent will *likely* be unfit for the task of child-rearing, “this parental right lapses, and society has a duty to intervene for the sake of the child”.¹⁵⁵ For Arneson, democratic rights work in the same way. Since obtaining the consent of all those who will be affected by the legislation enacted as a result of one's voting patterns is impossible, the only possible way to justify democratic rights is by demonstrating that possessing these rights tends to provide better outcomes than any other system of decision-making in a complex modern society. Further, just as a parent's right to exercise power over her children only obtains so long as she is acting to protect her children's fundamental interests, one's right to exercise power through voting only obtains so long as this protects the fundamental rights of all persons in society (and does so better than any feasible alternative arrangement).

Implicit in this argument is the assumption that, in actual practice, assigning equal democratic rights to all citizens produces better outcomes than the alternatives. This may seem implausible since, for Arneson, the exercise of power over others is only legitimate if one is both *morally competent*, meaning that one has the ability to discern what actions

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.* Further, this presumptive right parents possess to determine how their children will be raised only exists because this is the best system we have discovered *so far*. If it turns out that raising children in a collective arrangement run by the state is more beneficial to child development, then the right to exercise traditional parental authority will disappear.

will “be conducive to the fulfillment of the rights of those affected by her exercise of power”, and *well-disposed* to use this competence to secure the rights of others.¹⁵⁶ However, not all persons are equally morally competent, and, further, moral competence is not equally distributed throughout the population, there are certain identifiable factors that tend to produce more morally competent individuals on average. Thus, if it is possible to reliably select “just persons of very high moral competence”, putting power in the hands of a ruling elite should produce better outcomes than equal distribution of political power throughout the population.¹⁵⁷ The problem with the autocratic solution is that, historically, it has proven impossible to consistently pick out competent moral reasoners who continue to act in the best interest of all without giving into “the enormous temptations to corruption that are inseparable from the exercise of autocratic power”.¹⁵⁸ Thus, democracy emerges as a *second-best* solution for protecting the fundamental rights of all. Even though majoritarian decision making procedures may carry the risk of violating *minority* rights, this is still preferable to minority rule which risks violating the rights of the *majority*.¹⁵⁹

Recall, however, that the type of regime under discussion here is not simple majoritarian rule. Arneson's arguments for the protective account are primarily directed towards modern substantive constitutional democracies which have built in protections

156 *Ibid.*, 98. Conversely, one could be morally competent but wish to bring about amoral outcomes, or well-disposed, but incapable of discerning what actions will be effective in protecting the fundamental rights of others.

157 *Ibid.*, 99.

158 *Ibid.*

159 *Ibid.* Even in a tyranny of the majority at least the fundamental rights of *most* are being protected. This is also assuming that these are the only two options, but Arneson is arguing for a substantive constitutional democracy which has protections in place against at least the most severe minority rights violations.

for the fundamental rights of persons, minority groups in particular. The United States Bill of Rights, for example, enumerates a list of “fundamental liberties enforced by an independent federal judiciary” of non-elected officials serving lifetime tenures in office.¹⁶⁰ This serves to set certain limits on majority rule, overturning democratic decisions which violates the liberties listed in the Bill of Right; effectively constraining the legislative powers of elected officials. The very fact that the Bill of Rights (and other constitutional protections) are designed to prevent democratically elected officials from violating the fundamental rights of persons is evidence, for Arneson, that the protective account provides the correct explanation of the root justification for all democratic rights. If the will of the majority can be overturned in the name of higher, or more fundamental, rights or principles, then it is *these rights* which give democratic rights their value.

The argument given in the preceding paragraph may seem to contradict Arneson's earlier worries about the dangers of autocratic decision-making procedures, but the difference here is that appointed officials, such as Supreme Court judges, who who are entrusted with interpreting and ruling on constitutional matters have their political powers strictly limited by design. This is not to say that Arneson thinks that constitutional guardians such as the United States Supreme Court will always rule correctly, they may be mistaken at times, but the fact that these institutions exist (and that democratic rights may be trumped when their exercise conflicts with the fundamental rights of persons) demonstrates that these democratic rights are grounded in more foundational values, and, thus, only instrumentally important. Thus, Arneson concludes that “democratic

¹⁶⁰ *Ibid.*

procedures, like all procedures [including substantive constitutional limits to democracy], should be evaluated according to the moral value of the outcomes they would reasonably be expected to produce”.¹⁶¹

3.2 The Free and Equal Ideal Under the Protective Account

With an understanding of the protective account in place we can now return to Arneson's account of what it means to treat someone as free and equal, and compare this to the ideal given by Gaus, and others who argue for the intrinsic worth of democracy more generally. As mentioned above, the main claim of the protective account is that democratic rights are merely instrumentally valuable because they best protect the fundamental rights of persons. Thus, while granting equal democratic rights to all may be necessary to treat persons as free and equal moral agents, this is only because this is the most effective way (perhaps the only workable way) to protect their individual fundamental rights. In short, Arneson argues that treating others as free and equal involves respecting their fundamental interests, and, as such, any exercise of power over others in society (such as voting) must promote the fulfillment of the fundamental rights of all those affected.

Put in terms of socio-moral rules or laws, to treat persons as free and equal under the protective account one must ensure that the rule being proposed or endorsed does not violate the fundamental rights of one's fellows; and, further, “best promotes fulfillment of the fundamental rights of the people over whom power is exercised together with one's

¹⁶¹ *Ibid.*, 101.

own fundamental rights”.¹⁶² Practically speaking, this means that one must only propose or endorse those rules or laws which one reasonably believes will produce the morally *best outcome*. Contrast this with Gaussean public reason liberalism where members of the public can put forth or endorse or defeat proposals on the basis of any evaluative standard or belief, as long as the proposed rule does not obviously violate the freedom and equality of others. In this way the standard given by Arneson is far stricter than that espoused by Gaus, as public reason liberalism only requires members of the public to be *reasonably* good willed, whereas Arneson's protective account seems to claim that the exercise of one's democratic rights is only legitimate when acting from altruistic motivations. Further, if exercises of political power over others are only legitimate if they *best* promote or protect the fundamental rights of all, then this implies that all exercises of political power which fall short of this ideal are illegitimate or unjustified in some sense. Moreover, this also raises the issue of establishing independent standards which we can use to decide which set of proposed rules will result in the morally best outcome; or, for that matter, what outcome we should judge to be morally best.¹⁶³

But, this line of criticism may be off the mark, and even somewhat uncharitable. Arneson's standard for legitimate exercises of power over others becomes more plausible when discussing the legislative level, using the best results standard as a way to test the legitimacy of government exercises of power in a substantive constitutional democracy.

162 *Ibid.*, 97. (Emphasis own).

163 Recall Arneson's claim that the protective account is independent of any particular understanding of fundamental rights. This is correct, but there will have to be at least some consensus within society that there are some outcomes that are clearly morally preferable or superior to others. This is not necessarily true in a modern pluralistic society – those who value liberty above all may gladly accept greater social inequality in exchange for more economic freedom, whereas those who rank equality or community highly may be willing to sacrifice economic freedom in exchange for greater social protections.

The idea here is that a piece of legislation enacted through majoritarian decision-making procedures in a society can potentially be tested against a set of constitutionally protected individual rights, and struck down as illegitimate if it does not best promote the fundamental rights of all citizens (at least, when compared to existing legislation, or no rule at all). Moreover, democratic decision-making procedures *as a whole* can also be tested through the best results standard by examining how well they promote and protect the rights of individuals when compared to alternative arrangements (monarchic, communist, anarchist, autocratic, etc.). Thus, Arneson is making the empirical claim that we have good evidence that substantive constitutional democracies protect the fundamental rights of their citizens better than any other political system operating today or in the past, and, further, this is the only reason why democratic rights have value.

The interpretation of “best results” or “best outcomes” given above makes the protective account more plausible, but it is still debatable that this the *best* explanation for the value of democratic rights, or even a realistic way of evaluating the legitimacy of democratic decision-making procedures. For Arneson, the protective account explains why democracy is a second best solution to the problem of justifying the exercise of power over others, since he believes that garnering consent from all those affected by potential legislation is impossible. But, this implies that *if it were possible* for everyone within society to consent to all of the rules or laws that they are subject to, this would be the ideal solution. Thus, the question of whether procedural theories such as Gaussean public reason liberalism, or instrumentalist theories such as Arneson's protective account, give a better (or more accurate, or more plausible) explanation for how to treat others as

free in equal while exercising power over them in a modern pluralistic society will hinge on whether or not Arneson is correct in claiming that it is impossible to obtain consent from all those subject to coercive rules or laws.¹⁶⁴ Conversely, if Gaus is correct in holding that, at least at the level of partially idealized actual persons, it is possible for all reasonably good willed members of the public to endorse all the socio-moral rules that they are subject to, then the protective account is unnecessarily paternalistic.

To explain, Arneson does not make the claim that consenting to the set of rules or laws one lives under is a fundamental right, but he does seem to imply that obtaining the consent of all persons in society would be an effective way of bringing about good outcomes since this would ensure that the interests of all (and their fundamental rights) are being respected. Thus, ensuring universal consent would be the best solution to protecting the fundamental rights, but since this is impossible democracy emerges as the second best solution. However, this is still an instrumental argument for the importance of consent. There is a potential for pushback here: Arneson stresses that we do not know the full set of fundamental rights, or their content, and argues that his protective account operates independent of any particular conception of fundamental rights. But, this leaves open the possibility that there exists a fundamental right to participate in, or have some say over, the composition or constitution of the society one lives in, including the set of rules which one is subject to. That is, if some sort of right to live in a society whose rules reflect one's full set of principles (or, more minimally, to have *some say* in the organization of society and the rules one lives under) exists, then it is difficult to see how

164 Presumably this would also have to hold for partially idealized moral agents such as Gaus's members of the public.

any non-democratic decision-making system could accommodate this. This would make a democratic right to participate in the decision-making process basically identical to a fundamental right to contribute to the makeup of one's society. It is conceivable that this right could be respected by a benevolent dictatorship, where the autocracy listens very carefully to the views of the citizens before making decisions, but this is unlikely, and somewhat unsatisfactory. Thus, the distinction between fundamental rights and democratic ones may not be quite as simple as Arneson makes it out to be. Furthermore, Arneson's protective account would *not* be independent of the content of fundamental rights, its accuracy would depend on whether or not a right to participate in or contribute to the constitution of one's society is within the set of fundamental rights of persons.

Arneson's protective account may give a compelling justification for the instrumental value of democratic decision-making procedures, but it does not completely capture what it means to treat another as a free and equal moral agent. Arneson argues that the exercise of power over others in society must be justified by the good moral outcomes they create, but this is only because he holds that obtaining the consent of all affected persons is *impossible*. But, it is difficult to see how one can respect the freedom and equality of others while imposing coercive laws over them which they do not endorse. It is true that *some* people in society will have to be treated as children who cannot be trusted to act in their own best interests, instead of moral agents who can be engaged in democratic deliberation (Gaus's theory acknowledges this fact with his comments about unreasonable persons), but the protective account treats *all* persons this way by justifying exercises of power over them without even attempting to obtain their

consent first. There is a qualitative difference between democratic and non-democratic decision-making procedures; giving people a say in the makeup of their society and the rules they live under is more than a way of bringing about morally-positive outcomes, it shows respect for persons' ability to reason, and judges them to be equals in their right to have some say in the composition of their own society. In short, democracy treats people as rational adults to be consulted, instead of children to be controlled.

Conclusion

In this thesis I have argued that Gaussean public reason liberalism fails to adequately resolve the tension between the freedom and equality of persons and the exercise of authority over our fellow members of society. This has been demonstrated in two ways. First, Gaus's argument rests on a suspect premise (the asymmetry of justification and blameless liberty as a baseline), and, thus, is a questionable solution to fundamental theoretical disagreement between reasonable persons. Second, even if the theoretical problems with using blameless liberty as a baseline can be overcome, certain hard cases cast doubt on the ability of Gaus's baseline to settle contentious areas of social morality because of differences in interpretation. Thus, Gaussean public reason liberalism fails to offer a convincing account of how the free and equal ideal can be reconciled with the exercise of authority within a modern pluralistic society of diverse peoples, at least without presupposing a highly controversial (and theoretically and practically problematic) premise. However, despite its shortcomings, Gaussean public reason liberalism still provides a more promising approach to reconciling authority and the free and equal ideal than instrumentalist theories such as Arneson's protective account, which fails to fully capture the importance of public deliberation, and social participation, in treating persons as free and equal moral agents.

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